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A Principled Approach to Separating the Fusion Between Nursing Homes and Prisons

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A Principled Approach to Separating the Fusion Between Nursing Homes and Prisons

Professor Mirko Bagaric,* Marissa Florio,** & Brienna Bagaric***

Abstract

Elderly people are a far lower risk to community safety than other individuals. Despite this, elderly prisoners are filling prisons at an increasing rate. The number of elderly prisoners in the United States has increased more than fifteen-fold over the past three decades—far more than the general imprisonment rate. This trend is empirically and normatively flawed. Older offenders should be treated differently from other offenders. The key reason for this is that elderly offenders reoffend at about half the rate of other released prisoners, but the cost of incarcerating the elderly—due to their more pressing health needs—is more than double. The maturity and infirmity of most elderly offenders mean that they present a far lower risk to community safety than other offenders do. The sentencing system should be reformed to properly accommodate elderly offenders’ relevantly different situation. This Article argues that the incarceration levels of elderly offenders should be reduced by introducing specific mitigating factors into the sentencing calculus and by using progressive forms of punishment, especially electronic monitoring. These reforms will not make communities less safe, but they will reduce the fiscal burden on the sentencing system and enhance the normative integrity of the sentencing process.

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I. INTRODUCTION

Over the past four decades, the United States has seen a massive increase in incarceration rates.¹ There are now more than two million people incarcerated in American federal prisons, state prisons, and local jails.² Approximately 700 out of every 100,000 American adults are now in prison.³ This rate increased more than four-fold over the past forty years.⁴ In most developed countries, the rates of imprisonment are profoundly lower than those in the United States.⁵ It has recently been noted that “U.S. incarceration is . . . striking when compared to incarceration in other countries. In fact, the United States incarcerates over 20[%] of the world’s prisoners despite having less than 5[%] of the world’s population . . . , and the U.S. incarceration rate is over four times the world average rate.”⁶ This

1. NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (Jeremy Travis et al. eds., 2014).

2. *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Apr. 20, 2017). The exact number of prisoners is 2,145,100, including pretrial detainees. *Id.*; see also E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012* (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>. For a breakdown of the incarceration numbers, see Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POL’Y INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html>.

3. *United States of America*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Apr. 20, 2017).

4. NAT’L RESEARCH COUNCIL, *supra* note 1, at 2.

5. See *Highest to Lowest—Prison Population Total*, *supra* note 2.

6. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 23 (2016) (citations omitted), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> [hereinafter CEA ECONOMIC PERSPECTIVES]; see also *Incarceration*, SENT’G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Apr. 20, 2017); Nick Wing, *Here Are All of the Nations that Incarcerate More of Their Population than the U.S.*, HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html. Current incarceration rates are historically and comparatively unprecedented. NAT’L RESEARCH COUNCIL, *supra* note 1. The United States has the highest incarceration rates in the world, reaching extraordinary levels over the last two decades. *Id.*; MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 9 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf. Rates in Organisation for Economic Co-operation and Development (OECD) nations range from 47 to 266 per 100,000 adults. *Id.* at 10; see also Wing, *supra* (“At 716 per 100,000 people in 2013, according to the International Centre for Prison Studies, the U.S. tops every other nation in the world. Among OECD countries, the competition isn’t even

problem is so acute that over-imprisonment is now a major social and political issue, and there are loud voices calling for an age of decarceration.⁷

The rate at which older people are imprisoned has increased considerably despite the fact that this group is far less likely to commit crime than younger people.⁸ Over the past five years, the portion of prisoners in state and federal prisons who are fifty years old or older has increased by approximately 70%.⁹ The increase of older prisoners becomes more significant as the cohort becomes older and the comparative time span increases.¹⁰ In the fifteen-year period between 1995 and 2010, the number of prisoners who were fifty-five or older in United States prisons increased at six times the rate of the overall prison population.¹¹ Incredibly, during the four-year period from 2007 to 2010, the number of prisoners aged sixty-five or older grew at nearly ninety-four times the rate of the total prison population.¹² Surprisingly, although there is far less to fear from the elderly, their incarceration rates have increased more significantly than any other cohort in the community.¹³

All people should be punished commensurate with the seriousness of their crimes.¹⁴ This applies to aged offenders no less than to the rest of the

close—Israel comes in second, at 223 per 100,000.”).

7. See, e.g., The Editorial Board, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html?_r=2 (“The American experiment in mass incarceration has been a moral, legal, social, and economic disaster. It cannot end soon enough.”); The Editorial Board, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html> (arguing that Congress should bring “some basic fairness and rationality back into the nation’s horribly skewed drug laws”); *Notable New Group Advocating for Sentencing Reforms: Law Enforcement Leaders to Reduce Crime and Incarceration*, SENT’G LAW & POL’Y: AFFILIATE L. PROFESSOR BLOGS NETWORK (Oct. 21, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html (noting widespread calls for an end to “unnecessary incarceration in the U.S.”).

8. See *infra* Part V.

9. See *infra* Section III.A.

10. See *infra* Section III.A.

11. HUMAN RIGHTS WATCH, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES* 6 (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwc_over_0.pdf [hereinafter HUMAN RIGHTS WATCH].

12. *Id.*

13. See *id.*

14. This stems from the principle of proportionality, discussed in Section VII.A of this Article.

community.¹⁵ However, aged offenders are a discrete cohort in society so far as the purposes and objectives of the criminal justice system and sentencing are concerned.¹⁶ Currently, however, the relevant differences are not properly reflected in sentencing principles and practices.¹⁷ This has resulted in a profound policy disfigurement regarding the approach to sentencing aged offenders.¹⁸ In particular, a large number of aged offenders are subjected to the most significant deprivation in our system of law—imprisonment¹⁹—with no demonstrable benefit to the community. Paradoxically, the over-punishment of thousands of aged offenders needlessly penalizes the community with the massive fiscal burden that stems from housing them.²⁰ Detaining offenders is always an expensive exercise, but it is almost twice as expensive to incarcerate frail and infirm people than any other offenders.²¹

The over-imprisonment of aged offenders has caused some commentators to call for a reduction in the sanctions that are often imposed on them.²² These calls have been ineffective. The aged imprisonment rate continues to rise.²³

This Article argues that many aged offenders should be punished less harshly than other offenders.²⁴ However, this argument is based on more nuanced reasons than those previously suggested. The solution to reducing aged prison populations is unlikely to be found within the confines of the current approach to criminal sanctions.²⁵ Aged offenders have different criminogenic and physical profiles than other offenders, and these

15. See *infra* Section VII.A.

16. See *infra* Section III.A.

17. See *infra* text accompanying notes 243–51.

18. See *infra* Section III.A.

19. With the obvious exception of the death penalty.

20. See *infra* Section V.B.

21. See *infra* note 355 and accompanying text.

22. See, e.g., *Aging Behind Bars*, CRIM. JUST. DEGREE HUB, www.criminaljusticedegreehub.com/geriatric-prisoners/ (last visited Apr. 21, 2017); CTR. FOR JUSTICE AT COLUMBIA UNIV., *AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY* (2015), http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf; HUMAN RIGHTS WATCH, *supra* note 11.

23. See *infra* Part III.

24. See *infra* Part V.

25. See *infra* Part IV.

differences should be addressed by sanctions specifically adapted to the elderly.

Many normative arguments have been made in favor of reduced sanctions for aged offenders.²⁶ In our view, however, most of these arguments are flawed. For example, as discussed below, some argue that the burden of imprisonment is greater on aged offenders because years at the end of life are more precious than earlier years.²⁷ Others suggest that it is a human right for people to have legitimate hope that the future will be better than the present.²⁸ But these arguments are unlikely to convince lawmakers to reduce the burden of criminal sanctions on aged offenders.

The normative arguments mentioned above are based on conjecture, and they lack moral persuasion. There is no evidence to suggest that time at the end of one's life is more valuable than time at an earlier point. In fact, because younger incarcerated people are deprived of the opportunity to explore their potential and form and consolidate meaningful relational bonds, it can be argued just as persuasively that depriving people's liberty in their twenties and thirties is more damaging than depriving people's liberty later in life. Further, the suggestion that hope of a better life is a human right is devoid of a concrete foundation. In short, it is a fanciful right.

However, there are powerful empirical reasons for sentencing the aged more leniently.²⁹ Incapacitation for community protection is arguably the most important sentencing objective, and it has certainly been a driving force behind sentencing policy in the United States over the past few decades.³⁰ Other than capital punishment, imprisonment should be the most effective way to ensure that offenders do not commit crimes in the community.³¹ Assuming that incapacitation is the goal, it is futile to pursue the incapacitation of offenders who will not reoffend during their term of imprisonment. The futility argument applies more strongly to aged

26. See *infra* Part VI.

27. See *infra* Section VI.A.

28. See *infra* Section VI.B.

29. See *infra* Section V.

30. See *infra* notes 145–49 and accompanying text.

31. See VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE 6 (2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> (pointing out that, despite this assumption, “the bulk of research on the deterrent effects of harsher sentences fails to support these assertions”).

offenders than any other community cohort. It is firmly established that aged offenders reoffend far less frequently than other offenders.³² Given the strong correlation between aging and reduced rates of offending, the orthodox approach of using prior criminal offenses as a crude measure of predicting future offenses is inapposite to apply to elderly offenders.³³ Diminishing the emphasis on incapacitating aged offenders logically means that far less aged offenders should be imprisoned.

In addition, an important objective in implementing criminal sanctions is that they be cost-effective.³⁴ Thus, it is self-defeating for the community to impose sanctions that are more burdensome on society than the crimes the sanctions seek to prevent.³⁵ Although there is no clear methodology for calibrating the dollar cost of crime, crude calibrations are possible, and there are precise quantifications of the cost of imprisonment.³⁶ On average, it costs taxpayers in the United States \$31,286 in direct expenditures to house a prisoner for one year.³⁷ In 2010, corrections expenditures in the United States exceeded \$80 billion.³⁸ The scale of this spending—even for the world’s largest economy—is considerable, especially when the overall total expenditure on the criminal justice system is \$270 billion—equating to \$870

32. See *infra* Section V.A.

33. See *infra* Section V.A.; Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 351–56 (2014).

34. See, e.g., WRIGHT, *supra* note 31, at 8 (“Incarceration is an expensive sanction and sentencing people to longer prison terms has resulted in valuable resources being devoured.”).

35. See *id.*

36. See, e.g., CEA ECONOMIC PERSPECTIVES, *supra* note 6, at 34–52; DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM (Steven Raphael & Michael A. Stoll eds., 2009); Chris Doucouliagos et al., *Are Estimates of the Value of a Statistical Life Exaggerated?*, 31 J. HEALTH ECON. 197 (2012).

37. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), <http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>. This is higher in some states and cities. See *id.* For example, in the state of New York, the average cost to house a prisoner is about \$60,000 each year, and in the city of New York, the cost is \$168,000 per year. *Id.*; Marc Santora, *City’s Annual Cost per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?_r=0.

38. MELISSA S. KEARNEY ET AL., *supra* note 6, at 2. This is more than \$260 per capita. CEA ECONOMIC PERSPECTIVES, *supra* note 6, at 5.

per capita.³⁹

Aged prisoners present a far greater fiscal burden on the community than other offenders.⁴⁰ The infirmity and poor health experienced by many aged offenders means that it costs more than double the amount to imprison them, compared to other prison cohorts.⁴¹ Calibrating this increased cost properly into sentencing determinations should logically entail a significant reduction in aged prisoner numbers.

However, the distinctive considerations that apply to aged offenders do not all support greater leniency towards them. Aged offenders generally have fewer dependents than younger offenders, and hence, the social, economic, and emotional disadvantages to others associated with their incarceration are less considerable than in the case of younger offenders.⁴² Further, empirical data shows that the offenses many aged offenders are sentenced for are among the most serious forms of crime.⁴³ Aged offenders in some jurisdictions commit a disproportionately higher number of sexual and violent offenses,⁴⁴ which greatly damage victims.⁴⁵

Considerations relating to incarceration and the cost effectiveness of sanctions are important integers regarding the appropriate sanction; however, the ultimate fulcrum upon which sentencing is based is the principle of proportionality.⁴⁶ This is the view that the seriousness of the offense should be matched by the hardship of the penalty.⁴⁷ Accordingly, aged offenders who commit serious offenses should not receive considerably lighter penalties for reasons relating to their age *alone*. Despite this, the arguments relating to lower recidivism rates and the increased financial cost to detain aged offenders weigh decisively in favor of a fundamentally

39. CEA ECONOMIC PERSPECTIVES, *supra* note 6, at 5.

40. *See infra* Section V.B.

41. *See infra* Section V.B.

42. *See infra* Part V.

43. *See infra* note 44 and accompanying text.

44. E.A. CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, AGING OF THE STATE PRISON POPULATION, 1993–2013 1 (2016), <https://www.bjs.gov/content/pub/pdf/aspp9313.pdf> (“Between 1993 and 2013, more than 65% of prisoners age 55 or older were serving time in state prison for violent offenses, compared to a maximum of 58% for other age groups sentenced for violent offenses.”).

45. *See infra* notes 522–27 and accompanying text.

46. *See infra* notes 507–16 and accompanying text.

47. *See infra* note 507 and accompanying text.

different sentencing approach for aging offenders.⁴⁸

This Article argues that, as a general rule, no aged offender should be imprisoned unless they have committed a serious sexual or violent offense, and when prisoners reach a threshold age and have served half of their sentence, they should be subjected to a different sentencing regime, unless there are exceptional reasons for keeping them in mainstream prison.⁴⁹

To be clear, in broad terms, there are two cohorts of aged offenders in prison. The first are those who committed an offense when they were elderly. The second are offenders who committed an offense at a younger age and then reached the age threshold while in prison. This Article deals most directly with the first cohort of offenders.⁵⁰ However, it also makes sentencing recommendations to reduce the number of offenders who reach the aged-offender threshold during imprisonment.⁵¹

Part I defines the concept of aging, concluding that while there is no objective definition of “aged,” for the purposes of sentencing, an appropriate threshold is fifty years old.⁵² Part II examines the data on incarceration levels for aged offenders and notes that these levels have dramatically increased over the past few decades.⁵³ This is followed, in Part III, by an examination of current sentencing principles as they relate to aging.⁵⁴ Part IV sets out three reasons for punishing aged offenders less harshly than other offenders.⁵⁵ In doing so, it analyzes aged offenders’ offending patterns, their recidivism rates, and the financial cost of detaining them.⁵⁶ This is followed in Part V by a discussion of normative reasons advanced for sentencing the elderly more leniently.⁵⁷ This Article rejects these normative reasons, but in Part VI, recommends a different sentencing approach for aged offenders.⁵⁸

This Article considers offending patterns, sentencing principles, and

48. See *infra* Part VII.

49. See *infra* Part VII.

50. See *infra* Parts IV–VII.

51. See *infra* Section VII.A.

52. See *infra* notes 73–80 and accompanying text.

53. See *infra* Part III.

54. See *infra* Part IV.

55. See *infra* Part V.

56. See *infra* Part V.

57. See *infra* Part V.

58. See *infra* Part VI.

incarceration levels in the United States and Australia.⁵⁹ As discussed below, the Australian perspective can potentially be illuminating for several reasons.⁶⁰ First, it supports the proposition that old people commit less crime than young people.⁶¹ As it transpires, the similarities between aged offending patterns in the United States and Australia are striking.⁶² Second, unlike the United States, sentencing courts in Australia have a large degree of discretion.⁶³ Despite this, aged incarceration levels in Australia are, relatively speaking, similar to those in the United States.⁶⁴ This suggests that the solution to reducing aged incarceration rates involves express statutory rules, as opposed to enhancing judicial sentencing discretion. Conferring more sentencing discretion on judges is not the solution—or even part of the answer. This realization is cardinal to the recommendations in this Article.

II. DEFINING “AGING”: FIFTY YEARS

Age is an absolute concept. A person’s chronological age is readily measured in terms of years and months. *Aging*, however, is a relative notion by its nature.⁶⁵ One of the principle considerations that informs the notion of aging is life expectancy.⁶⁶ Life expectancy has grown quite considerably in the past 100 years, although it has tapered off in the past decade or so.⁶⁷ The average life expectancies in the United States and Australia are currently seventy-nine and eighty-two years, respectively.⁶⁸ Crudely, aged people are

59. See *infra* Part IV.

60. See *infra* notes 255–75 and accompanying text.

61. See *infra* notes 304–07 and accompanying text.

62. See *infra* notes 309–411 and accompanying text.

63. See *infra* Part IV.

64. See *infra* Part III.

65. See Peter H. Schuck, *The Golden Age of Aging, and Its Discontents*, 18 ELDER L.J. 25, 29 (2010) (noting that the longer lifespans have “transformed the . . . concept of being elderly,” with the elderly tending to look and feel much younger than their predecessors did at the same chronological age).

66. See *id.*; see also Petr Klemra & Stanislav Doubal, *A New Approach to the Concept and Computation of Biological Age*, 127 MECHANISMS AGEING & DEV. 240, 240 (2006).

67. NAT’L INST. ON AGING, GLOBAL HEALTH AND AGING 6–7 (2011), https://www.nia.nih.gov/sites/default/files/global_health_and_aging.pdf.

68. *Life Expectancy at Birth, Total (Years)*, WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.LE00.IN> (last visited Apr. 21, 2017).

somewhere towards the end part of the normal eighty year life span.⁶⁹ But, there is no logically definitive way to draw a bright line in this continuum to signify the point at which aging commences.

In the context of sentencing, there have been a number of thresholds at which aging has been designated.⁷⁰ These include fifty, fifty-five, sixty, and sixty-five years of age.⁷¹ None of these figures is clearly more accurate than the others in terms of defining the point at which a person is aged. Obviously, the higher the age threshold is set, the fewer the number of offenders caught within the net, and the greater the homogeneity associated with the group. Setting the threshold lower will capture more offenders, and in all likelihood, the cohort will be more disparate in terms of its relevant traits, such as health status and reoffending patterns. Further, there is no clear convergence in the literature regarding the threshold at which a person becomes elderly for criminal justice purposes.⁷²

This Article chose a threshold of fifty years, which is near the start of the spectrum in terms of previous definitions that have been advanced.⁷³ This has the benefit of capturing the largest relevant cohort of offenders and potentially makes the reform recommendations the most impactful.⁷⁴ Further, as discussed below, fifty appears to have considerable objective relevance as far as sentencing considerations are concerned.⁷⁵ As discussed below, it is at this point that the rate at which people commit crime and the rate at which they are likely to reoffend decreases markedly.⁷⁶ It is also at

69. See NAT'L INST. ON AGING, *supra* note 67, at 16 (reporting a steady decline in health status scores beginning at approximately fifty years of age in six countries).

70. See John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 ELDER L.J. 273, 323–24 (2003) (noting the wide variety of definitions of elderly status within the criminal justice system).

71. *Id.*

72. See *id.* at 324 (noting the likelihood that no true consensus will emerge concerning the definition of elderly status, given the divergent views throughout the criminal justice system).

73. See *supra* notes 69–71 and accompanying text.

74. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 29 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> (reporting the percentage of prisoners sentenced under state and federal jurisdictions by age group). In 2014, for example, 18.6% of prisoners sentenced were fifty years old or older, in comparison with only 10.1% of prisoners age fifty-five years old or older. *Id.*

75. See *infra* Part III.

76. See *infra* Section V.A.

about this age that a person's health status and health needs differ considerably from the rest of the population.⁷⁷

In addition, although a fifty-year-old person in the community might not be considered "elderly," research establishes that the physiological age of an incarcerated individual is approximately ten to fifteen years older than a nonincarcerated person of the same age.⁷⁸ This means that a fifty-year-old prisoner will often display the physical and mental infirmities more typical of a sixty or sixty-five year old.⁷⁹ The evidence indicates that the harsh environment of prison, the stress of prison life, and the high burden of disease—all exacerbated by low standards of medical care—drastically accelerate the aging process.⁸⁰

This Article also discusses the marked criminogenic or other relevant differences between aged people beyond fifty years and any relevant data that relates only to offenders older than fifty.⁸¹ Thus, this Article also often addresses the empirical data regarding offenders aged fifty-five, sixty, and sixty-five and over.⁸²

77. See *infra* Section V.B.

78. OFFICE OF THE INSPECTOR GEN., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 1–2 (2015), <https://oig.justice.gov/reports/2015/e1505.pdf> [hereinafter OFFICE OF THE INSPECTOR GEN.]. Note that this is obviously contingent upon the time they have been incarcerated. See *infra* Section V.C (discussing how prisoners fifty years old and older tend to have more health problems than younger prisoners and nonincarcerated individuals of the same age).

79. See OFFICE OF THE INSPECTOR GEN., *supra* note 78, at 1–2.

80. See CARRIE ABNER, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION (2006), <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf>; HUMAN RIGHTS WATCH, *supra* note 11; James Baldwin & Jasmin Leete, *Behind Bars: The Challenge of an Ageing Prison Population*, 1 AUSTL. J. DEMENTIA CARE 16 (2012), <http://journalofdementia.care.com/wp-content/uploads/2014/04/AJDC-Prisons-Aug-Sept-2012.pdf>.

81. See *infra* Section IV.A.2 (discussing age as a mitigating factor that courts sometimes use to reduce sentences).

82. See *infra* Part V.

III. TRENDS IN INCARCERATING THE AGED

A. *The Situation in the United States*

The rate of aging prisoners has been steadily increasing since 1980.⁸³ Over the past fifteen years, the aging prison population has grown faster than both the total prison population and the population of nonincarcerated older adults.⁸⁴ Today, aged offenders represent the fastest-growing cohort of any prisoners in the United States.⁸⁵

The starkest figures are set out in a 2012 report by Human Rights Watch, which notes that in the fifteen-year period from 1995 to 2010, the number of prisoners in state and federal United States prisons aged fifty-five years or older increased nearly three-fold (282%)—rising from 32,600 to 124,400⁸⁶—compared to the overall prisoner population increase of 42%.⁸⁷

A time span over more than thirty years shows an even more pronounced increase in the rate of aged prisoners.⁸⁸ In 2014, the total number of inmates aged fifty-five years or older in state and federal prisons was 151,500.⁸⁹ This compared to 8,853 in 1981.⁹⁰ It is projected that this figure will reach 400,000 by 2030—a 4400% increase from 1981.⁹¹ Thus, nearly one-third of the projected total prisoners in the United States will be over the age of fifty-five.⁹²

83. Inimai Chettiar & Will Bunting, *Keeping Low Risk Elderly Prisoners Behind Bars Is a Budget Buster*, CTR. FOR AM. PROGRESS (June 13, 2012, 9:00 AM), <https://www.americanprogress.org/issues/civil-liberties/news/2012/06/13/11726/keeping-low-risk-elderly-prisoners-behind-bars-is-a-budget-buster>.

84. Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 60 J. AM. GERIATRICS SOC'Y 1150, 1151 (2012).

85. AM. CIVIL LIBERTIES UNION, *THE MASS INCARCERATION OF THE ELDERLY* 57 (2012), https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf [hereinafter AMERICAN CIVIL LIBERTIES UNION].

86. HUMAN RIGHTS WATCH, *supra* note 11, at 19.

87. *Id.* at 20.

88. *See infra* notes 89–90 and accompanying text.

89. *U.S. Prison Population Declined One Percent in 2014*, BUREAU OF JUSTICE STATISTICS (Sept. 17, 2015, 10:00 AM), <http://www.bjs.gov/content/pub/press/p14pr.cfm>.

90. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at i; *see also* Chettiar & Bunting, *supra* note 83.

91. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 5.

92. *Id.*

This trend in high rates of aging incarceration concerns not only prisoners who are fifty-five and over, but also those in the age bracket over fifty.⁹³ The most recent Bureau of Justice Statistics report sets out in detail the 2014 state and federal prison cohort demography by age.⁹⁴ The report notes that the portion of prisoners aged fifty and above was 18.6%—there were a total number of 1,508,636 sentenced prisoners that year.⁹⁵ More particularly, the ratio of prisoners aged fifty to fifty-four was 8.5%, fifty-five to fifty-nine was 5.1%, sixty to sixty-four was 2.7%, and sixty-five or older was 2.3%.⁹⁶

According to Bureau of Justice Statistics data, the total increase in the portion of prisoners aged fifty years or above is marked over the most recent five-year period.⁹⁷ For the 2009 prisoner cohort, the total number of sentenced prisoners was 1,443,500, 10.5% of which comprised prisoners aged fifty and above.⁹⁸ More particularly, the ratio of prisoners aged fifty to fifty-four was 5.3%, fifty-five to fifty-nine was 2.7%, sixty to sixty-four was 1.4%, and sixty-five and older was 1.1%.⁹⁹ This is a 68% increase in only five years.¹⁰⁰

This trend is continuing even against the backdrop of a recent slight decline in overall state and federal prisoner numbers and can be detected even over the span of a single year.¹⁰¹ In 2014, there was a slight drop from 2013 in overall prisoner numbers (in the order of approximately 1%),¹⁰² but despite this general trend, the portion of aged prisoners increased for age categories from the previous year.¹⁰³

In 2013, the total number of sentenced prisoners was 1,574,700.¹⁰⁴ The

93. *Id.* at 9.

94. CARSON, *supra* note 74.

95. *Id.* at 29.

96. *Id.*

97. *Id.*

98. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 27 (2010), <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

99. *Id.*

100. See *supra* notes 93–99 and accompanying text.

101. See CARSON, *supra* note 74, at 1.

102. *Id.* at 2.

103. *Id.* at 15.

104. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

report notes that the ratio of prisoners aged fifty to fifty-four was 8.4%, fifty-five to fifty-nine was 4.9%, sixty to sixty-four was 2.5%, and sixty-five or older was 2.1%.¹⁰⁵ Thus, we see that in a one-year period against the backdrop of slightly falling prisoner numbers, the rate of older prisoners is still climbing: from 17.9% to 18.6%, which is a 4% increase in a single year.¹⁰⁶

In the federal sphere alone, there has been a particularly marked increase in prisoners aged fifty years or older in recent years.¹⁰⁷ A 2015 report by the Office of the Inspector General¹⁰⁸ notes that “inmates age 50 and older were the fastest growing segment of its inmate population, increasing 25[%] from 24,857 in fiscal year . . . 2009 to 30,962 in [fiscal year] 2013.”¹⁰⁹ By comparison, during the same four-year period, inmates aged forty-nine and younger decreased by approximately 1%, whilst those aged twenty-nine and younger decreased by a considerable 16%.¹¹⁰

The increase in aged prisoners is more pronounced as the age cohort gets older.¹¹¹ Thus, for the four-year period from 2007 to 2010 (inclusive), the number of state and federal prisoners aged sixty-five and over grew by 63%, while the overall prison population increased by less than 1% (0.7%).¹¹²

There are two main reasons for the rapid growth in aged incarceration levels.¹¹³ First, average prison sentences are increasing in length, and hence, prisoners age more while in prison.¹¹⁴ Thus, more prisoners who are

105. *Id.* at 8.

106. *See supra* notes 95–96, 105 and accompanying text.

107. *See infra* notes 108–10 and accompanying text.

108. OFFICE OF THE INSPECTOR GEN., *supra* note 78.

109. *Id.* at i.

110. *Id.*

111. *See infra* note 112 and accompanying text.

112. HUMAN RIGHTS WATCH, *supra* note 11, at 6. A similar trend applies over longer periods. CARSON & SABOL, *supra* note 44, at 1. A 2016 Bureau of Justice Statistics Report focusing on the number of sentenced prisoners in state prisons during the twenty-year period from 1993 to 2013 also highlights the disproportionate growth in the aged prisoner population. *See id.* (noting that the number of prisoners sentenced to more than one year imprisonment increased by 55% during this period, while the number of state prisoners age fifty-five or older increased by a staggering 400% during this period).

113. *See infra* notes 114–28 and accompanying text.

114. *See infra* notes 115–22 and accompanying text.

relatively young upon admission to prison are likely to be aged by the time of release.¹¹⁵ A 2012 report found that the average length of prison sentences has increased by 36% since 1990.¹¹⁶ Further, according to a 2013 Sentencing Project report, one out of every nine prisoners in U.S. prisons is serving a life sentence.¹¹⁷ This is more than four times the rate in 1984 (despite crime rates declining during this period).¹¹⁸ Moreover, the number of prisoners serving a life sentence without the possibility of parole increased by 22% between 2008 and 2013.¹¹⁹

The Human Rights Watch report cited above pragmatically illuminates the effect that tough sentencing policies have had on the aging prison demographic.¹²⁰ It notes that in 2011, 28% of prisoners aged sixty years or older in New York prisons had been incarcerated for twenty years or longer, and of those prisoners, 7.1% have between ten to nineteen years remaining to serve before they are eligible for release.¹²¹

According to statistics from the National Corrections Reporting Program, almost 13.2% of prisoners who entered state prisons in 2009 aged between thirty-one to forty years were sentenced to more than twenty years, while 10% of those aged between fifty-one to sixty years were given sentences in excess of twenty years (23,515 and 3864 prisoners, respectively).¹²²

The second reason for the increase in aged incarceration levels is that more elderly people are being sentenced to terms of imprisonment: “From 2001 to 2008, new commitments of inmates age [fifty-five] and older increased by 55[%], from 5,750 individuals to 8,914, compared with an 8[%] increase among all age groups, from 294,147 to 316,475.”¹²³

115. See *infra* notes 116–22 and accompanying text.

116. THE PEW CTR. ON THE STATES, TIME SERVED 2 (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeserved.pdf.pdf.

117. THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2015), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

118. *Id.* at 13.

119. *Id.* at 1.

120. HUMAN RIGHTS WATCH, *supra* note 11, at 32.

121. *Id.*

122. *Id.* at 28.

123. THE PEW CHARITABLE TRS., MANAGING PRISON HEALTH CARE SPENDING 9–10 (2013), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/pctcorrectionshealthcarebri

Overall, the data shows that the increase in the number of aged offenders has at least partially been a result of new sentences:

[T]he number of persons entering state prison as new court commitments at the age of [fifty-five] years or older grew 109[%] between 1995 and 2009. In the same period, the number of all new commitments increased by 9.7[%]. The variations between individual years are significant and suggest caution in interpreting the data, but the overall trend is nonetheless clear.¹²⁴

Only a small part of the increase in the elderly prison population is attributable to the aging U.S. population.¹²⁵ In the thirty years from 1980 to 2010, the median age increased from 30 to 37.2.¹²⁶ Moreover, the portion of aged people is increasing but is nowhere near the same rate as the increase in incarceration levels among aged people.¹²⁷ In 1980, the portion of the population that was sixty-five years and older was 8%, and this grew to 12% in 2010.¹²⁸

B. *The Situation in Australia*

In Australia, there is also a pronounced trend in the aging of the prison population, although the rate of increase is not as pronounced as in the United States.¹²⁹ Between 2000 and 2010, the number of inmates aged fifty years or over rose from 8.3% to 11.2% of the total Australian prison population.¹³⁰ In absolute terms, there were approximately an additional 1500 older inmates.¹³¹ This is an 84% increase since 2000.¹³² Within this

ef050814pdf.pdf.

124. HUMAN RIGHTS WATCH, *supra* note 11, at 37.

125. *See infra* notes 126–28; *see also* Williams et al., *supra* note 84, at 1151.

126. UNITED STATES CENSUS BUREAU, A LOOK AT THE 1940 CENSUS 13 (2010), https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf.

127. *See* Williams et al., *supra* note 84, at 1151.

128. CARRIE A. WERNER, UNITED STATES CENSUS BUREAU, THE OLDER POPULATION: 2010 3 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>.

129. *See infra* notes 130–35.

130. Susan Baidawi et al., *Older Prisoners—A Challenge for Australian Corrections*, TRENDS & ISSUES IN CRIME & CRIM. JUST. 1, 2 (Aug. 2011), <http://apo.org.au/system/files/26107/apo-nid26107-94521.pdf>.

131. *Id.*

cohort of prisoners, those aged over sixty-five experienced the most rapid growth, with a staggering 141% increase.¹³³ By comparison, the total prison population grew by 36% during the same ten-year period.¹³⁴ This has greatly outstripped the growth of aging in mainstream Australia: figures show that the number of Australians aged fifty and over grew by only 31% between 2000 and 2010.¹³⁵

Thus, it is manifest both that the number of elderly prisoners is increasing and that their rate of increase greatly exceeds both the rate of increase in the general prison population and the portion of people in the community that are elderly.¹³⁶ It follows that the criminal justice system is operating in a manner whereby aged offenders are disproportionality being sentenced to imprisonment. Ostensibly, one obvious explanation for the increase in elderly prisoners is that the average age in the community is increasing, mainly due to a longer life expectancy.¹³⁷ However, this is only a very small part of the answer, given that the portion of elderly persons in prison far exceeds the portion of elderly persons in the general community.¹³⁸ Other reasons that explain the higher elderly incarceration numbers include longer sentences and the lack of mitigation accorded to them.¹³⁹ The next part of the Article examines the current manner in which the sentencing system deals with age in the sentencing calculus.

IV. THE CURRENT LEGAL SITUATION REGARDING AGED OFFENDERS

This part of the Article sets out the current law regarding the relevance of age to sentencing decisions.¹⁴⁰ To contextualize this, it provides a brief overview of the legal sentencing framework.¹⁴¹

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See supra* notes 129–35 and accompanying text.

137. *See supra* notes 129–35 and accompanying text.

138. *See supra* notes 129–35 and accompanying text.

139. *See* Baidawi, *supra* note 130 and accompanying text.

140. *See* discussion *infra* Sections IV.A–B.

141. *See* discussion *infra* Sections IV.A–B.

A. *The United States*

While each jurisdiction in the United States has its own distinctive sentencing system,¹⁴² there are a number of foundational commonalities that operate throughout America.¹⁴³ Most broadly, there is considerable convergence in the key objectives of sentencing. The main aims are community protection, deterrence (general and specific), rehabilitation, and retribution.¹⁴⁴ The objective which has been pursued most strongly over the past forty years is community protection.¹⁴⁵

Community protection has been most markedly pursued by the introduction of fixed or presumptive minimum penalties, which apply to some extent in all parts of the United States.¹⁴⁶ The penalties are usually set out in a table, with the main key variables being the seriousness of the offense and an offender's criminal history.¹⁴⁷ Presumptive or fixed penalties

142. Sentencing (and, more generally, criminal law) in the United States is mainly the province of states. *See* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)). The summary of the United States sentencing system presented herein is derived from Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 360–67 (2014) [hereinafter Bagaric, *From Arbitrariness to Coherency in Sentencing*].

143. *See infra* notes 144–45 and accompanying text.

144. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2016).

145. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 321–24.

146. *Id.* at 3. As noted by William W. Berry III,

[p]rior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 . . . moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.

William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631, 633 (2008); *see also* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 696 (2010); CONNIE DE LA VEGA, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 45 (2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf>. Minimum penalties are also one of the key distinguishing aspects of the United States' sentencing system compared to that of Australia—and most other sentencing systems in the world. *See id.* at 46–47 (noting that 137 of 168 surveyed countries had some form of minimum penalties, but none were as wide-ranging or severe as those in the United States).

147. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM'N 2016); *see also* Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 180 (2016).

are widely regarded as being severe. For example, Michael Tonry notes:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all [fifty] states), three-strikes laws ([twenty-six] states), [life-without-possibility-of-parole] laws ([forty-nine] states), and truth-in-sentencing laws ([twenty-eight] states), in some places augmented by “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.¹⁴⁸

These laws have been further criticized for lacking a theoretical or empirical foundation. To this end, Michael Tonry asserts that the laws stem from “back-of-an-envelope calculations and collective intuitive judgements [sic].”¹⁴⁹

1. Federal Law

The United States Sentencing Commission Guidelines Manual (“Federal Sentencing Guidelines”) contains the most extensively analyzed prescribed penalty laws.¹⁵⁰ The importance of these Guidelines is underscored by the frequency with which offenders are sentenced under the federal system and their substantial state-level doctrinal influence.¹⁵¹

As with most grid sentencing systems, offense severity and criminal history are the key considerations which inform the penalty under the

148. Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 514 (2014) (citations omitted).

149. *Id.*

150. Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 361; U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM’N 2016).

151. Bagaric & Gopalan, *supra* note 147; Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006). There are more than 200,000 federal prisoners. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, BULLETIN NO. NCJ 247282, PRISONERS IN 2013 2 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>.

Federal Sentencing Guidelines.¹⁵² Although, an offender's criminal history does not relate to the immediate offense for which an offender is sentenced, it can have a profound impact on the sanction that is imposed. A bad criminal history score can in some cases lead to an approximate doubling of the penalty.¹⁵³

In *United States v. Booker*,¹⁵⁴ the Supreme Court held that the Guidelines do not operate in a mandatory manner; rather than are advisory in nature.¹⁵⁵ Despite this, the Guidelines are still an influential reference point

152. See U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM'N 2016); see generally Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008).

153. U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM'N 2016); Bagaric & Gopalan, *supra* note 147.

154. *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court held that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Id.* at 258; see also *Pepper v. United States*, 562 U.S. 476, 481 (2011) (“[W]hen a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence . . . that . . . may . . . support a downward variance from the now-advisory Federal Sentencing Guidelines range.”); *Irizarry v. United States*, 553 U.S. 708, 715 (2008) (“[T]here is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).”); *Greenlaw v. United States*, 554 U.S. 237 (2008); *Gall v. United States*, 552 U.S. 38, 41 (2007) (“[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”); *Rita v. United States*, 551 U.S. 338, 350–51 (2007) (holding that federal appellate courts may apply presumption of reasonableness to a district court sentence that is within properly calculated Sentencing Guidelines range).

155. See sources cited *supra* note 154. Consequently, district courts are required to properly calculate and consider the Guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. § 3553(a)(4), (5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall*, 552 U.S. at 49 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”). A district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See *Rita*, 551 U.S. at 350–51; see also *Gall*, 552 U.S. at 46–47 (2007) (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications [A]ppellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical

in the determination of penalties.¹⁵⁶

In addition to criminal-history score and offense severity, there are also a number of other considerations that influence the penalty pursuant to the Guidelines.¹⁵⁷ The most important is § 3553, which, in relevant part, states:

(a) Factors to be Considered in Imposing a Sentence—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant;
- and

formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.”).

156. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors*, DEFENDER SERVICES OFF. TRAINING DIV. (July 25, 2011), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/no-more-math-without-subtraction.pdf. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247, 253–59 (Julian V. Roberts ed., 2011). In 2014, for the first time, the federal courts imposed more sentences outside the Guidelines than within the Guideline range. However, this was by a small margin. See U.S. SENT’G COMMISSION, FINAL QUARTERLY DATA REPORT 2 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

157. See *infra* notes 158–82 and accompanying text.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹⁵⁸

In addition to this, the Guidelines stipulate over three dozen other factors that are relevant in determining the appropriate penalty.¹⁵⁹ Some considerations are also expressly precluded as being relevant to the ultimate sanction.¹⁶⁰ Thus, there are a number of mitigating and aggravating considerations that can be taken into account by courts in setting the appropriate Guideline penalty.¹⁶¹ Mitigating and aggravating factors come in two main forms: namely, adjustments and departures.

“Adjustments” are factors that increase or decrease penalty by a set amount.¹⁶² Thus, by way of example, demonstration of remorse accompanied by an early guilty plea can decrease the penalty by up to three levels.¹⁶³ The other main type of aggravating and mitigating variable is a “departure.”¹⁶⁴ A departure enables courts to more readily set a sentence outside the Guideline range.¹⁶⁵ Further, as noted above, in accordance with 18 U.S.C. § 3553, courts can in rare instances invoke considerations that are not set out in the Guidelines as a basis for not imposing a Guideline penalty.¹⁶⁶ In circumstances where a court departs from the Guideline range,

158. 18 U.S.C. § 3553(a)(1)–(2) (2012) (emphasis added). For a discussion of the operation of this provision, see Berry III, *supra* note 146, at 2471; Baron-Evans & Coffin, *supra* note 156.

159. See U.S. SENTENCING GUIDELINES MANUAL §§ 3A1–3E1 (U.S. SENTENCING COMM’N 2016).

160. See Baron-Evans & Coffin, *supra* note 156, at 5–6. For a historical overview of the development of aggravating and mitigating considerations in the Guidelines, see *id.* at 2–6.

161. See *infra* notes 162–67 and accompanying text.

162. See U.S. SENTENCING GUIDELINES MANUAL §§ 3A1–3E1 (U.S. SENTENCING COMM’N 2016).

163. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) & cmt. 2 (U.S. SENTENCING COMM’N 2016). However, the Guidelines provide that the court cannot depart from a guideline range as a result of “[t]he defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See § 6B1.2 (Standards for Acceptance of Plea Agreement).” *Id.* § 5K2.0(d)(4).

164. *Id.* §§ 5K1–5K3.

165. *Id.* § 1A1.4(b).

166. See *id.* § 5K2.0(a)(2)(B); see also Gall v. United States, 552 U.S. 38, 46–47 (2007); Pepper

it is required to set out its reason.¹⁶⁷

Age is a consideration that the Guidelines expressly state can reduce the severity of a sanction.¹⁶⁸ Section 5H1.1 relevantly states:

§5H1.1. Age (Policy Statement)

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).¹⁶⁹

Under previous versions of Section 5H1.1, while age could be relevant in special circumstances, it typically would not be a factor of consideration.¹⁷⁰ As explained by the First Circuit in 1994, “[a]ge is among the various specific offender characteristics that the guidelines treat as ‘discouraged’ for purposes of a departure. In other words, age is a factor ‘not ordinarily relevant’ to the departure calculus.”¹⁷¹ The statute was revised to its current language above.¹⁷² However, commentators suggest that the change in language was not accompanied by a change in substance:

Age, mental and emotional conditions, physical condition, physique, and military service, formerly deemed “not ordinarily relevant,” now “may be relevant,” but the standard for when factors

v. United States, 562 U.S. 476, 500 (2011).

167. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(e) (U.S. SENTENCING COMM’N 2016).

168. *See id.* § 5H1.1, p.s.

169. *Id.*

170. *See infra* note 171 and accompanying text.

171. United States v. Jackson, 30 F.3d 199, 202 (1st Cir. 1994).

172. *See supra* text accompanying note 169.

“may be relevant” focuses not on the purposes of sentencing, but on presence to an “unusual degree” that distinguishes the case from “typical” cases sentenced under the guidelines, the same standard for factors deemed “not ordinarily relevant” before the PROTECT Act.¹⁷³

Regardless of the language of the statute, 67% of judges surveyed in 2010 stated that the age of an offender is “ordinarily relevant” to the question of whether there should be a departure from the guideline range.¹⁷⁴ In that same year, “age was cited as a reason to sentence below the guideline 779 times, or in approximately 5.7% of cases receiving a sentence below the guideline range.”¹⁷⁵ These statistics demonstrate that many judges do typically take age into account when sentencing.¹⁷⁶ This consideration resulted in observable benefits in the sentencing process for aged offenders, with studies finding that, “whatever the reason, elderly offenders were more likely than others to benefit from leniency in sentencing during the Guidelines era.”¹⁷⁷

Age is not only a mitigating factor, but can also be an aggravating factor in sentencing determinations.¹⁷⁸ The Eighth Circuit commented, “[a] defendant’s ‘advanced age’ is a possible, but *not* mandatory, basis for granting a downward variance. ‘Advanced age,’ under some circumstances,

173. Baron-Evans & Coffin, *supra* note 156, at ii.

174. *Id.* at 52.

175. *Id.* at 70.

176. See, e.g., *United States v. Cannaday*, No. 08-172, 2009 WL 1587183, at *3 (E.D. Wis. June 5, 2009) (citing the Commission’s report showing that “recidivism tends to decline among those around defendant’s age” and imposing a two year sentence that was likely below the applicable guideline range, but was sufficient no matter what the proper guideline range proposed); *United States v. Panyard*, No. 07-20037-2, 2009 WL 1099257, at *13 (E.D. Mich. Apr. 23, 2009) (“[T]his is Defendant’s sentence the Court considers, not that of all other potential future offenders, and Defendant’s very low personal likelihood of recidivism supports a reasonable variance.”); *United States v. Martinez*, No. 99-40072-03-RDR, 2007 WL 593629, at *2 (D. Kan. Feb. 21, 2007) (considering a non-guideline sentence based, in part, on the defendant’s age, and referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, No. 04CR.1146-03 (RWS), 2006 WL 1311982, at *4 (S.D.N.Y. May 10, 2006) (noting that several courts have imposed nonguideline sentences for defendants over forty based on markedly reduced recidivism, citing recidivism study).

177. Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 NAELA J. 221, 240 (2011).

178. See *infra* notes 179–82 and accompanying text.

could itself be a basis for an upward variance.”¹⁷⁹ However, in practice, advanced age is typically only seen as mitigating: “with a single exception in fiscal year 2008, courts uniformly viewed age as mitigating, citing it 699 times as a reason for a below guideline sentence, nearly a third of the time sponsored by the government.”¹⁸⁰ A district court’s determination of whether to take age into account, and whether to account it as a mitigating factor or an aggravating factor, is rarely upset by appellate courts: the district court judge has discretion in sentencing that is reversed only where it is unreasonable.¹⁸¹ In fact, before *Booker*, a district court’s decision not to depart from the guidelines was essentially unreviewable.¹⁸²

Studies are unclear as to whether people of advanced age receive more lenient or harsher penalties:

[s]ome researchers have found that elderly offenders, if convicted, are more likely to be fined or otherwise receive lighter sentences, and many also receive leniency before or during the guilt-determination phase. Conversely, other researchers have found quite the opposite—that elderly offenders are sentenced more harshly than younger offenders and may even be more likely to be convicted.¹⁸³

However, overall, the consensus is that people of advanced age receive the sympathy of judges and juries.¹⁸⁴ Prosecutors typically refrain from seeking the death penalty for the elderly in acknowledgement that few juries would authorize it.¹⁸⁵

For reasons discussed more expansively below, there is often a correlation between aging and poor health.¹⁸⁶ The Guidelines also provide

179. *United States v. Scott*, 732 F.3d 910, 918 (8th Cir. 2013) (internal citations omitted).

180. *Baron-Evans & Coffin*, *supra* note 156, at 58.

181. *United States v. Brooke*, 308 F.3d 17, 23 (D.C. Cir. 2002) (finding that the district court’s findings of fact were not clearly erroneous, so the defendant could not be given a downward departure for physical condition or advanced age).

182. *United States v. Pinnick*, 47 F.3d 434, 439 (D.C. Cir. 1995).

183. *Miller*, *supra* note 177, at 221, 238.

184. *Id.*

185. *Id.*

186. *See infra* notes 187–205.

scope for this to mitigate penalty.¹⁸⁷ The language of Section 5H1.1 requires that both age *and* infirmity must exist together in order to warrant a downward departure.¹⁸⁸ Most courts apply Section 5H1.1 only where both age and infirmity are present.¹⁸⁹ A district court judge in Massachusetts stated, “I must make those quantitative judgments about both factors—age *and* infirmity. Age and infirmity are linked by a conjunction in Section 5H1.1 (i.e., the defendants must be both ‘elderly’ and ‘infirm’). Indeed, I am obliged to read Section 5H1.1 (age) together with Section 5H1.4 (physical condition).”¹⁹⁰ Section 5H1.4 states, in relevant part:

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.¹⁹¹

While physical condition can be a ground for imposing something other than imprisonment, such as home confinement, it can also be a ground for a shorter sentence length.¹⁹²

187. See *infra* notes 188–205.

188. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.1, p.s. (U.S. SENTENCING COMM’N 2016); *supra* text accompanying note 169; see also *United States v. Jackson*, 30 F.3d 199, 203 n.4 (1st Cir. 1994) (quoting Section 5H1.1) (“To be sure, the guidelines permit consideration of the age of a mature defendant as a ground for departure ‘when the offender is elderly *and* infirm.’”). Note that the emphasis in the original on the word *and* was amended and removed in November 1991. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 386 (U.S. SENTENCING COMM’N 2016).

189. See, e.g., *United States v. Camacho-Montalvo*, 583 Fed. App’x 552 (7th Cir. 2014) (holding that a district court need not address arguments relating to the defendant’s age on the ground that, under Section 5H1.1, age is “relevant only when defendant is old and infirm”).

190. *United States v. Baron*, 914 F. Supp. 660, 662 (D. Mass. 1995).

191. U.S. SENTENCING GUIDELINES MANUAL § 5H1.4, p.s. (U.S. SENTENCING COMM’N 2016).

192. See *United States v. Ghannam*, 899 F.2d 327, 329 (4th Cir. 1990) (“Section 5H1.4 does not, however, contemplate that a defendant’s physical condition is relevant only to the decision whether to impose imprisonment. Section 5H1.4 allows downward departures any time a sentencing court is presented with sufficient evidence of impairment. Section 5H1.4’s observation that extraordinary impairment might justify an alternative to imprisonment does not preclude the possibility that

Both age and physical condition have been used as mitigating factors by courts for decades to reduce sentences for the aged, but often they are conflated into one factor, and age alone is not enough to warrant a departure.¹⁹³ In *United States v. Baron*, Judge Gertner sentenced an offender who pled guilty to bank fraud to one year of probation (including six months of home confinement) after taking into account these two factors.¹⁹⁴ The guideline range for his crime would have been twenty-seven to thirty-three months in prison.¹⁹⁵ Note that this case occurred while the sentencing guidelines were mandatory, and departing from the guideline range was a relative rarity.¹⁹⁶ In *Baron*, the defendant was seventy-six years old and suffered from a medical condition by which everyday germs or stress could lead to a rapid deterioration of his health.¹⁹⁷ After Judge Gertner detailed his medical conditions, she relied on a doctor's expert testimony that the stress of prison could make his condition worse and potentially life-threatening, and found that home confinement would be an efficacious alternative.¹⁹⁸ Similar severity of physical condition was present in other cases of downward departure.¹⁹⁹ In *United States v. Maltese*,²⁰⁰ the district court judge allowed a downward departure based on Sections 5H1.1 and 5H1.4 because Maltese was sixty-two years old and suffering from liver cancer,

impairment might also warrant a shorter sentence. The greater departure, no imprisonment, includes the lesser departure, shorter imprisonment.”).

193. See *United States v. Johnson*, 242 F. App'x 7, 11 n.5 (4th Cir. 2007) (first citing *United States v. Jackson*, 30 F.3d 199, 202–03 (1st Cir. 1994); *United States v. Fierro*, 38 F.3d 761, 775 (5th Cir. 1994); and then citing *United States v. Baron*, 914 F. Supp. 660 (D. Mass. 1995)) (“[O]ur sister circuits have held that downward departures are inappropriate when based merely on the fact that a defendant would be elderly when released, or that a lengthy Guidelines sentence would effectively sentence an elderly defendant to life. Indeed, no reported circuit decision has been found approving a downward departure based *solely* on a defendant's age. But some courts have found that where a defendant's age and medical condition render him feeble and infirm, a departure may appropriately be granted.”).

194. *Baron*, 914 F. Supp. at 665.

195. *Id.* at 662.

196. See Press Release, U.S. Dep't of Justice, Fact Sheet: The Impact of *United States v. Booker* on Federal Sentencing 2, (Mar. 15, 2006), https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf (reporting that in fiscal year 2004—the year before *Booker* was decided—only 5.2% of cases had downward departures from the guidelines).

197. *Baron*, 914 F. Supp. at 662.

198. *Id.* at 663.

199. See *infra* notes 200–03.

200. *United States v. Maltese*, No. 90 CR 87–19, 1993 WL 222350 (N.D. Ill. June 22, 1993).

with deteriorating health and a low likelihood of surviving more than one year.²⁰¹ In *United States v. Libutti*,²⁰² the district court judge permitted a downward departure in terms of sentence length based on the defendant's age of sixty-two and a combination of his mental and physical conditions that would make prison life more difficult (claustrophobia, panic disorder, and a cardiac condition), but still required jail time due to the grievous nature of the crimes of bank fraud and conspiracy.²⁰³

Notably, some federal courts have been resistant to allowing for downward departures due to age and infirmity.²⁰⁴ In 2012, Circuit Judge Richard Posner brushed aside a defendant's argument that his sentence should be lessened due to his age and infirmity with one sentence: "[a]s for age and infirmity, age [fifty-nine] is not elderly in our society; the elderly do not have a license to commit crime; and adequate medical care is available in federal prisons."²⁰⁵ Similar approaches have been taken by other state and federal courts:

One of the most prominent concerns expressed by circuit courts in their decisions was specific deterrence and risk of recidivism, as numerous cases held that even though the offender was of older age and/or in poor health, the nature of the crime, history of recidivism, and/or risk of future recidivism justified the length of the sentence imposed. Some federal and state courts suggested that old age was simply not an independently relevant factor in determination of the sentence. Other courts took a different approach—acknowledging the limited relevance of age as a mitigating factor and considering age to the extent it was relevant, but nonetheless rejecting defendant's arguments to further reduce the sentence on account of age.²⁰⁶

201. *Id.* at *10.

202. *United States v. Libutti*, Crim. No. 92-611(JBS), 1994 WL 774647 (D.N.J. Dec. 23, 1994).

203. *Id.* at *10.

204. *See infra* note 205 and accompanying text.

205. *United States v. Moreland*, 703 F.3d 976, 991 (7th Cir. 2012) (citations omitted) (first citing *United States v. Johnson*, 685 F.3d 660, 662 (7th Cir. 2012); and then citing *United States v. Theunick*, 651 F.3d 578, 592) (6th Cir. 2011)).

206. *Miller*, *supra* note 177, at 241.

2. State Law

In addition to federal law, a number of individual states likewise take age into account in their sentencing statutes.²⁰⁷ State statutes typically have very general language when it comes to age as a mitigating factor. Usually, they do nothing more than state that age may be considered a mitigating factor. There is no guidance as to how old or young a defendant must be to have age considered, how heavily it should be weighed, or when exactly it should be a consideration. Additionally, many state statutes apply age as a mitigating factor specifically in sentencing for very serious crimes—those which are viable for the death penalty or a sentence of life without the possibility of parole.²⁰⁸

For example, Alabama's death penalty and life without parole sentencing statute reads, "Mitigating circumstances shall include, but not be limited to, the following: . . . (7) The age of the defendant at the time of the crime."²⁰⁹ California's death penalty and life imprisonment statute states, "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (i) The age of the defendant at the time of the crime."²¹⁰ Florida's death penalty and life imprisonment statute provides: "(7) Mitigating circumstances shall be the following: . . . (g) The age of the defendant at the time of the crime."²¹¹ Missouri's statute reads: "3. Statutory mitigating circumstances shall include the following: . . . (7) The age of the defendant at the time of the offense."²¹² Pennsylvania's first degree murder statute says, "(e) Mitigating circumstances shall include the following: . . . (4) The age of the defendant at the time of the crime."²¹³ Oregon's aggravated murder statute reads: "(c)(A) The court shall instruct the jury to consider . . . any mitigating circumstances offered in evidence,

207. See *infra* notes 209–51 and accompanying text.

208. See *infra* notes 209–51 and accompanying text

209. ALA. CODE § 13A-5-51(7) (Westlaw through Act 2017-81 of the 2017 Reg. Sess.).

210. CAL. PENAL CODE § 190.3(j) (West, Westlaw with urgency legislation through Ch. 4 of 2017 Reg. Sess.).

211. FLA. STAT. ANN. § 921.141(7)(g) (West, Westlaw with chapters from the 2017 First Regular Session of the 25th Legislature in effect through March 13, 2017).

212. MO. ANN. STAT. § 565.032.3(7) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th General Assemb., pending changes received from the Revisor of Statutes).

213. 42 PA. STAT. AND CONS. STAT. ANN. § 9711(e)(4) (West, Westlaw through end of the 2016 Reg. Sess.).

including but not limited to the defendant's age"²¹⁴ Other states that note "the age of the defendant at the time of the crime" may be a mitigating factor in sentencing for murder convictions include, but are not limited to: Nebraska,²¹⁵ Colorado,²¹⁶ Kansas,²¹⁷ North Carolina,²¹⁸ Wyoming,²¹⁹ Washington,²²⁰ Mississippi,²²¹ and Tennessee.²²²

The case law illuminates the application of these statutes.²²³ The Supreme Court of North Carolina has held that trial court judges in that state are *required* to submit the age of the defendant at the time of the crime to the jury as a mitigating factor in a capital murder case.²²⁴ The Superior Court of Pennsylvania reviewed a trial court's decision to sentence a "septuagenarian with health problems" to fifteen to thirty-one years of imprisonment, and opined,

[a]lthough we are troubled by the fact that the trial court all but guaranteed that Baker would serve a life sentence, we do not find this to be reversible error in this case. Arguably, any sentence of

214. OR. REV. STAT. ANN. § 163.150(1)(c) (West, Westlaw through end of the 2016 Reg. Sess. and ballot measures approved at the Nov. 8, 2016 General Election, pending classification of undesignated material and text revision by the Oregon Reviser).

215. NEB. REV. STAT. § 29-2523(2)(d) (West, Westlaw through legislation effective Feb. 16, 2017, of the 1st Reg. Sess. of the 105th Legis. (2017)).

216. COLO. REV. STAT. § 18-1.4-102(4)(a) (LEXIS through all laws passed at the 2d Reg. Sess. of the 70th General Assemb. of the State of Colo. (2016) and changes approved by the electorate at the General Election on November 8, 2016).

217. KAN. STAT. ANN. § 21-6625(a)(7) (West, Westlaw through laws enacted during the 2017 Reg. Sess. of the Kansas Legis. effective on or before Mar. 9, 2017).

218. N.C. GEN. STAT. § 15a-2000(f)(7) (LEXIS through Sess. Laws 2016-124 of the 2016 Third Extra Sess., Sess. Laws 2016-126 of the 2016 Fourth Extra Sess., and Sess. Laws 2017-2 of the 2017 Reg. Sess., but not including Sess. Laws 2016-125 of the 2016 Fourth Extra Sess., or corrections and changes made by the Revisor of Statutes).

219. WYO. STAT. ANN. § 6-2-102(j)(vii) (LEXIS through Chapter 119 of 2017 Legis. Sess., with exceptions of Chs. 7, 10, 11, 13, 22, 24, 35, 37, 39, 42, 45, 57, 60, 71, 76, 83, 86, 89, 90, 91, 93, 95, 96, 97, 98, 99).

220. WASH. REV. CODE ANN. § 10.95.070(7) (West, Westlaw with all laws from the 2016 Reg. and Special Sess. and Laws 2017, chs. 1 to 4 of the Washington legis.).

221. MISS. CODE ANN. § 99-19-101(6)(g) (West, Westlaw with laws from the 2017 Reg. Sess. effective upon passage as approved through Mar. 22, 2017).

222. TENN. CODE ANN. § 39-13-204(j)(7) (LEXIS Current through the 2016 Reg. Sess. and the 2nd Extraordinary Sess. of the 109th Tenn. General Assemb.).

223. See *infra* notes 224–25 and accompanying text.

224. *State v. Zuniga*, 498 S.E.2d 611, 613 (N.C. 1998).

incarceration could be a life sentence for Baker, a septuagenarian with health problems. The trial court considered Baker's history and his personal characteristics, *including his age*. . . . Based upon our review of the record and our standard of review, we have no basis to find that the sentence imposed is clearly unreasonable. As such, no relief is due.²²⁵

Some state courts find age to be a mitigating factor in sentencing only where the defendant's age is linked to lower culpability due to immaturity or senility.²²⁶ The Supreme Court of Florida has noted that despite age being a statutory mitigating circumstance, "numerical age alone may not be mitigating if not linked to some other material characteristic (e.g., immaturity)."²²⁷ Arizona courts have similarly held that "extreme youth or old age only becomes a mitigating factor when, because of immaturity or senility, the defendant lacks substantial judgment in committing the crime."²²⁸ The Tennessee Supreme Court only looks to age where a defendant's "age might implicate the offender's ability to 'appreciate the nature of his conduct' and requires that age be viewed in context, considering 'education, maturity, experience, mental capacity or development.'"²²⁹

State courts, in analyzing whether age should be a mitigating factor in a particular case, sometimes look to whether the defendant's age will prevent recidivism.²³⁰ In New York's *People v. Curthoy*,²³¹ the court analyzed the correction law referring to sex offenders, which allowed for a judge to consider "physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness" while determining a

225. *Commonwealth v. Baker*, 72 A.3d 652, 664 (Pa. Super. Ct. 2013) (emphasis added).

226. *See infra* notes 227–29 and accompanying text.

227. *Gonzalez v. State*, 136 So. 3d 1125, 1164 (Fla. 2014) (quoting *Lebron v. State*, 982 So. 2d 649, 660 (Fla. 2008)).

228. *State v. de la Garza*, 675 P.2d 295, 296 (Ariz. Ct. App. 1983) (per curiam), *disapproved of on other grounds by State v. Thurlow*, 712 P.2d 929, 932 (Ariz. 1986) (en banc).

229. Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 764 (2012) (quoting *State v. Adams*, 864 S.W.2d 31, 33 (Tenn. 1993)).

230. *See infra* notes 232–33 and accompanying text.

231. *People v. Curthoys*, 909 N.Y.S.2d 824 (App. Div. 2010).

sentence.²³² The court stated:

We are . . . unpersuaded by defendant's claim that his age and deteriorating health are mitigating factors warranting a downward modification of his risk assessment level. As the Board noted in its case summary, defendant was of an advanced age and in poor health at the time of his conviction, circumstances [that] did not prevent him from committing the crimes of which he was convicted—possessing pornographic pictures of children on his computer. Although he now claims that his mobility is limited due to, among other conditions, chronic obstructive pulmonary disease and cardiomyopathy, we note that good mobility is not required in order to download illicit photographs from the Internet; consequently, defendant's physical conditions do not “minimize [his] risk of re-offense.”²³³

In some jurisdictions, state courts look to age as a mitigating factor not only where explicitly noted in a statute.²³⁴ Common law has also developed in several states to allow judges to take age into account, although this happens most often in relation to youthful offenders rather than elderly.²³⁵ One way in which age may be raised as a factor in sentencing is through the U.S. Constitution's prohibition on “cruel and unusual punishment,” which requires that sentences be no more burdensome than necessary.²³⁶ In California's *People v. Lewis*, the court elaborated:

While a punishment may not be cruel and unusual in the abstract, it may be unconstitutional as applied to a particular defendant. The task is to decide if the penalty imposed is grossly disproportionate to the defendant's culpability. Stated another way, does “the punishment shock[] the conscience and offend[] fundamental notions of human dignity.” In making this inquiry courts consider

232. N.Y. CORRECT. LAW § 168-l(5)(d) (McKinney, Westlaw through L. 2017, chapters 1 to 23).

233. *Curthoys*, 909 N.Y.S.2d at 826 (second alteration in original) (citation omitted) (quoting N.Y. CORRECT. LAW § 168-l (5)(d)).

234. See *infra* notes 235–37 and accompanying text.

235. See, e.g., *State v. Ronquillo*, 361 P.3d 779, 788 (Wash. Ct. App. 2015).

236. See *Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012).

the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, the consequences of the act, *the defendant's age* and history of criminality and the defendant's mental capabilities.²³⁷

A defendant's poor health can be a mitigating factor in state law either in tandem with or separately from a defendant's old age.²³⁸ However, this factor often comes with limitations.²³⁹ One state that allows for bad health to be an independent mitigating factor is Tennessee.²⁴⁰ In Tennessee, bad health can be considered, but only if such a physical incapacity reduced the defendant's culpability for the offense: "[t]here must, therefore, be a causal connection between the condition and the offense."²⁴¹ Maine similarly allows for bad health as a mitigating factor, but the Supreme Judicial Court of Maine has held that it is "not an abuse of discretion for the court to decline to address the defendant's health issue."²⁴²

Thus, it is clear that age and poor health connected with aging can be a basis for sentence length.²⁴³ There is also already some scope for age to be meaningfully calibrated into the sentencing calculus.²⁴⁴ However, the evidence indicates that there is a gulf between the theory and the practice.²⁴⁵ As we have seen, although theoretically advanced age can be a mitigating factor this has not resulted in a reduction in the portion of elderly

237. *People v. Lewis*, 120 Cal. App. 4th 837, 856 (2004) (alteration in original) (emphasis added) (citation omitted) (quoting *People v. Cox*, 30 Cal. 4th 916, 970 (2003)).

238. See *infra* notes 240–42 and accompanying text.

239. See *infra* notes 240–42 and accompanying text.

240. W. MARK WARD ET AL., TENNESSEE CRIMINAL TRIAL PRACTICE § 28:37 (2016–2017 ed. 2016) (citing *State v. Henry*, No. 01C01–9505–CR–00161, 1999 WL 92939 (Tenn. Crim. App. Feb. 25, 1999), *aff'd*, 33 S.W.3d 797 (Tenn. 2000); *State v. Patton*, No. 01C01–9606–CR–00241, 1997 WL 742514 (Tenn. Crim. App. Nov. 25, 1997)).

241. See WARD, *supra* note 240, § 28:37.

242. *State v. Gray*, 893 A.2d 611, 617 (Me. 2006) (citing *State v. Shulikov*, 712 A.2d 504, 511 (Me. 1998)).

243. See *supra* notes 237–42 and accompanying text.

244. See *supra* note 237 and accompanying text.

245. See Michael Ollove, *Elderly Inmates Burden State Prisons*, PEW CHARITABLE TRUSTS (Mar. 17, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons>.

prisoners—in fact the opposite trend has occurred.²⁴⁶ The reason for the discord between the theory and practice is not clear.²⁴⁷ However, part of the reason may be that mitigating factors generally carry no precise discount, and hence possibly, judges often give aging only a very slight degree of weight.²⁴⁸ Further, in providing a discount to aged offenders, the strongest rationale for this is generally not acknowledged.²⁴⁹ As we shall see shortly, aged offenders are far less likely to reoffend than other offenders.²⁵⁰ The failure of judges to acknowledge this perhaps disinclines them from providing a meaningful sentencing reduction.²⁵¹

B. Australia

Like the situation in the United States, sentencing law is not uniform throughout Australia. Each of the nine Australian jurisdictions (the six states, Northern Territory, the Australian Capital Territory, and the Federal jurisdiction) has its distinctive sentencing law.²⁵² Despite this, at the overarching level, there is considerable convergence in the key objectives of sentencing law, the manner in which sentencing decisions are made, and the key factors that influence the outcome of sentencing decisions.²⁵³

At the broadest level, all Australian jurisdictions share the same aims. They are similar to those pursued in the United States and consist of community protection, general deterrence, specific deterrence, rehabilitation, and retribution.²⁵⁴

A key distinction between the sentencing processes in the United States and Australia is that throughout Australia sentencing, courts typically have a significant degree of discretion in setting the ultimate penalty.²⁵⁵ Fixed or

246. *See id.*

247. *See id.*

248. *See, e.g.,* United States v. Scott, 732 F.3d 910, 918–19 (8th Cir. 2013).

249. *See, e.g.,* United States v. Payton, 754 F.3d 375, 379 (6th Cir. 2014).

250. *See infra* Part V.

251. *See Payton*, 754 F.3d at 379.

252. MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING LAW (2016). The summary of sentencing law in Australia is derived from Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142.

253. Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142.

254. *Id.* at 369.

255. *Id.* at 368–69.

presumptive sentences are rare in Australia for serious offenses.²⁵⁶ The methodology by which Australian courts make sentencing decisions is known as the “instinctive synthesis.”²⁵⁷ The defining aspect of this decision-making process is that all relevant considerations are identified and then a penalty is imposed through the simultaneous conflating, weighing and adjusting of each consideration.²⁵⁸ “The hallmark of this process is that it does not require (nor permit) judges to set out with any particularity the weight (in mathematical terms) accorded to any particular consideration.”²⁵⁹ This leads to a considerable degree of subjectivity and an acceptance that there is no single sentence which is necessarily correct.²⁶⁰ Pursuant to this approach, sentencing courts are permitted to impose sentences within an “available range”;²⁶¹ the parameters of which are not clearly demarcated.²⁶²

Another contrasting aspect of Australian sentencing law compared to the United States is the far greater number of aggravating and mitigating considerations. There are in fact more than 200 factors that can either increase or decrease penalty.²⁶³ Mitigating factors that operate in each Australian jurisdiction include pleading guilty,²⁶⁴ mental impairment,²⁶⁵ youth,²⁶⁶ and onerous prison conditions.²⁶⁷ Aggravating factors include prior criminal record²⁶⁸ and committing offenses that involve a breach of trust.²⁶⁹

256. *Id.* at 371.

257. The term originates from the decision in *R v Williscroft* (1975) VR 292 (Austl.).

258. *Id.*

259. Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness—The Need to Abolish the Stain that Is the Instinctive Synthesis in Australia Sentencing*, 38 UNIV. NEW SOUTH WALES L.J. 76, 79–80 (2015).

260. *Id.*

261. See Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 368–69.

262. See *id.*

263. Compare JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 43 (1981) (identifying 229 factors), with LA TROBE UNIV., GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA’S MAGISTRATES’ COURTS (1980) (identifying 292 relevant sentencing factors).

264. See *Cameron v The Queen* (2002) 209 CLR 339, 342–43 (Austl.).

265. See *R v Tsiaras* (1996) 1 VR 398 (Austl.); see also *Muldrock v The Queen* (2011) 244 CLR 120 (Austl.); *R v Verdins* (2007) 16 VR 269 (Austl.).

266. *R v Neilson* (2011) QCA 369 (Austl.); *R v Kuzmanovski; ex parte Attorney-General* (Qld) (2012) QCA 19.

267. *Western Australia v O’Kane* (2011) WASCA 24 (Austl.); *R v Puc* (2008) VSCA 159 (Austl.); *Tognolini v The Queen* (2012) VSCA 311 (Austl.).

268. *Field v The Queen* (2011) NSWCCA 13 (Austl.); *Saunders v The Queen* (2010) VSCA 93

There are a number of mitigating factors that relate to aged offenders. They are similar to the approach in the United States.²⁷⁰ Old age of itself can mitigate, and so too can age coupled with bad health.²⁷¹

The older offenders become, the smaller the remaining portion of their lives.²⁷² Australian courts have taken the view that custody harms older offenders more than younger ones.²⁷³ Also, the courts have noted that hope, which impacts overall well-being, is likely to diminish as the prospect of dying in prison becomes more probable.²⁷⁴ Hence, Australian courts have taken the view that old age is a mitigating factor, beyond the increased health ailments that the elderly need to endure.²⁷⁵

In *Gulyas v Western Australia*,²⁷⁶ Steytler P set out a number of propositions in relation to sentencing older offenders.²⁷⁷ He stated that aging can mitigate penalty for a number of reasons.²⁷⁸ These include the fact that ill health can make prison more arduous and that a lengthy prison sentence can reduce any reasonable expectation of a useful life post-release.²⁷⁹ It was also noted that the objectives of deterrence and denunciation may be less important in the case of elderly offenders.²⁸⁰

The issue was considered in *R v RLP*,²⁸¹ where the court was dealing with an offender of seventy-seven years who had committed serious sexual offenses over a protracted period of time.²⁸² The court—after an examination of the authorities on the relevance of age and ill health to

(Austl.).

269. *DPP v Truong* (2004) VSCA 172 (Austl.); *Carreras v The Queen* (1992) 60 A Crim R 402 (Austl.); *A-G v Saunders* (2000) TASSC 22 (Austl.); *Hill v The Queen* (1999) TASSC 29 (Austl.); *R v Ottobriano* (1999) WASCA 207 (Austl.); *R v Black* (2002) WASCA 26 (Austl.).

270. *See* United States v. Baron, 914 F. Supp. at 660, 665 (D. Mass. 1995).

271. *See* discussion *supra* Section IV.A.

272. *See supra* Part III.

273. *See supra* Section III.B.

274. *See infra* Section VI.B.

275. *See supra* notes 263–69.

276. (2007) 178 A Crim R 539 (Austl.).

277. *See id.* at 552.

278. *Id.*

279. *Id.*

280. *Id.*

281. (2009) 213 A Crim R 461 (Austl.).

282. *See id.*

sentencing—distilled a number of propositions, the last two of which considerably reduce the impact of old age on sentence:

We approach the conjunction of the appellant's advanced years and ill health with these propositions in mind.

1. The age and health of an offender are relevant to the exercise of the sentencing discretion.
2. Old age or ill health are not determinative of the quantum of sentence.
3. Depending upon the circumstances, it may be appropriate to impose a minimum term [that] will have the effect that the offender may well spend the whole of his remaining life in custody.
4. It is a weighty consideration that the offender is likely to spend the whole or a very substantial portion of the remainder of their life in custody.
5. Other sentencing considerations may be required to surrender some ground to the need to exercise compassion to take account of the real prospect that the offender may not live to be released and that the offender's ill health will make his or her period of incarceration particularly onerous.
6. Just punishment, proportionality and general and specific deterrence remain primary sentencing considerations in the sentencing disposition notwithstanding the age and ill health of the offender.
7. Old age and ill health do not justify the imposition of an unacceptably inappropriate sentence.²⁸³

The reality is that old age rarely operates as a basis for a considerable

283. *Id.* at [39]; see also *R v Iles* (2009) VSCA 197 (Austl.); *TP v The Queen* (2012) VSCA 166 (Austl.).

sentencing reduction.²⁸⁴ A good example of the supposed mitigatory impact of old age being dealt with in a tokenistic manner is *Ljuboja v The Queen*.²⁸⁵ In this case, the court rejected an appeal against a twenty-five-year term of imprisonment with a minimum of sixteen years for serious drug charges.²⁸⁶ At the time of sentencing the offender was sixty years old.²⁸⁷ The court stated:

Australian authorities have established that advanced age is a relevant consideration in determining whether a sentence will be crushing. The rationale is that each year of a sentence represents a substantial proportion of the period of life [that] is left to an offender of advanced age

However, whether and, if so, to what extent leniency should be given to an offender of advanced age, depends on all of the facts and circumstances of the particular case. As Steytler P noted in *Gulyas*, the authorities emphasise that age is only one factor in the sentencing process, and that advanced age can never be a justification for a sentence [that] is not fairly proportionate to the offense or otherwise inappropriate An offense may be so serious that humanitarian considerations cannot be accommodated.

The illness of an offender may be a mitigating factor if it cannot be treated effectively in prison or if the nature of the illness will result in imprisonment being more onerous for the offender than would ordinarily be the case. However, as King CJ (Cox and O'Loughlin JJ agreeing) stressed in *R v Smith* (1987) 44 SASR 587, 589: . . .

Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health . . . Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of

284. See *infra* notes 285–88.

285. (2011) 210 A Crim R 274 (Austl.).

286. *Id.* at [34].

287. *Id.* at [15].

his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.²⁸⁸

*R v Cave*²⁸⁹ is perhaps the clearest example of advanced age not mitigating penalty in any real sense.²⁹⁰ The Full Court of South Australia refused to reduce a fifty-year prison term with a non-parole period of thirty-three years for sexual offenses.²⁹¹ This almost certainly consigned the accused to die in prison.²⁹² He was not eligible for parole until he was 89, and at the completion of the parole period, he would be aged 106.²⁹³

As noted in the extract from *Ljuboja v. The Queen* above, Australian courts have generally been prepared to confer a discount where medical circumstances (for any reason) make prison more difficult; however, there is no strict rule to this effect.²⁹⁴ Thus, in *R v Wickham*²⁹⁵ it was held that:

Common humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offense. However, whereas here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.²⁹⁶

Thus, in the United States and Australia, there is a close similarity in the approaches each country takes toward considering aging as a factor at sentencing.²⁹⁷ In both countries, aging and poor health can reduce penalties, and in both jurisdictions, the reality is that there is a runaway increase in

288. *Id.* at [102]–[104].

289. (2012) SASCFC 42 (Austl.).

290. See *infra* notes 291–93 and accompanying text.

291. See *Cave*, SASCFC 42 at [43].

292. *Id.* at [24].

293. See *id.* at [2], [44]; see also *RSJ v The Queen* (2012) VSCA 148 (Austl.) (giving little weight to advanced age in what the court stated was the worst type of incest offense). For an illustration of another case where little weight was given to the old age and poor health of the offender, see *R v Gordon* (2012) QCA 334 (Austl.).

294. See *supra* text accompanying note 288.

295. (2004) NSWCCA 193 (Austl.).

296. *Id.* at [3].

297. See *infra* text accompanying note 298.

elderly prisoners.²⁹⁸ In Australia, the likely explanation for this is again similar to that in the United States; namely, courts only give a very small amount of weight to these considerations.²⁹⁹ This is expressly facilitated by the discretionary nature of sentencing, whereby judges are expressly not permitted to set out with particularity the precise weight that has been conferred on any particular sentencing factor.³⁰⁰ Also, in conferring the discount, there is no reference to the strongest rationale for its justification

298. See *supra* text accompanying notes 11–14, 130–135, 173, 288.

299. See, e.g., *supra* note 293.

300. See *Pesa v The Queen* (2012) VSCA 109 (Austl.). The only exceptions are discounts, which are accorded for pleading guilty and cooperating with authorities. See, e.g., *Crimes (Sentencing Procedure) Act 1999* (NSW) §§ 22, 23. The normal range of the discount for pleading guilty is between 10% and 30%, depending on the circumstances of the case. See MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING LAW 205–06 (2016). In several jurisdictions, it is now either conventional or a statutory requirement to indicate the size of the discount. See, *Crimes (Sentencing Procedure) Act 1999* (NSW) §§ 22(2). In New South Wales and Queensland, the court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea. See *id.*; *Penalties and Sentences Act 1992* (Qld) s 13(3). In South Australia, Western Australia, and New South Wales, the courts often specify the size of the discount given. See, e.g., *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA). In Victoria, subsection 6AAA of the *Sentencing Act 1991* (Vic) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* (2012) VSCA 140 (Austl.). In Western Australia, section 9AA of the *Sentencing Act 1995* (WA) permits a court to reduce a sentence by up to 25% for a plea entered into at the first reasonable opportunity. In South Australia, recent legislative changes allow for a guilty plea reduction of up to 40% for an early guilty plea. See *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA) (introducing sections 10B and 10C into the *Criminal Law (Sentencing) Act 1988* (SA)). Providing assistance to authorities is treated in a similar way to guilty pleas, particularly where the assistance results in the detection and prosecution of other offenders. See, e.g., *Crimes (Sentencing Procedure) Act 1999* (NSW) §§ 22, 23. This benefit is given independent of any reasons or remorse that might be demonstrated by assisting the authorities. See GERALDINE MACKENZIE & NIGEL STOBBS, PRINCIPLES OF SENTENCING 93–94 (2010); RICHARD FOX & ARIE FREIBERG, SENTENCING: STATE AND FEDERAL OFFENDERS (2d ed., 1999). Assistance to law enforcement officials now enjoys recognition in a number of statutory regimes. See, e.g., *Crimes (Sentencing Procedure) Act 1999* (NSW) § 23. In terms of the size of the discount available, it has been held that the discount for a plea of guilty and assistance to authorities should be up to 50%. See *Penalties and Sentences Act 1992* (Qld) § 9(2)(i); *Crimes (Sentencing Procedure) Act 1999* (NSW) § 23; *Criminal Law (Sentencing) Act 1988* (SA) § 10(1)(h), 10A; *Sentencing Act 1995* (NT) § 5(1)(h); *Crimes (Sentencing) Act 2005* (ACT) § 36. There are also similar provisions at the Commonwealth level. See *Crimes Act 1914* (Cth) § 16(2)(h). For an example of where a 50% discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–50 [15]–[21] (Nettle JA) (Austl.). For an application of these principles, see *Dan Ning Wang v The Queen* (2010) NSWCCA 319 (Austl.); *Yue Ma v The Queen* (2010) NSWCCA 320 (Austl.); *R v Nguyen* (2010) NSWCCA 331 (Austl.).

(lower recidivism levels), and hence, this might discourage meaningful reductions being accorded for aging.³⁰¹ In any event, we now consider the doctrinal justifications for the role of aging in sentencing.³⁰²

V. THREE REASONS FOR SENTENCING AGED OFFENDERS LESS HARSHLY

A. Aged Offenders' Recidivism Rates Are Lower

A key reason for distinguishing between aged and young offenders, so far as decisions regarding the appropriate choice of sanction and length of prison terms are concerned, is the stark differences in reoffending between the cohorts.³⁰³ Studies show that by the age of fifty, the majority of individuals have outgrown the years they are most likely to engage in crime.³⁰⁴ This is known as the “aging out” phenomenon.³⁰⁵ The relationship between age and criminal activity is supported by extensive empirical studies, which consistently show that older offenders are substantially less likely than younger cohorts to commit additional crime after being released from prison.³⁰⁶ In fact, the aging prison population has the lowest recidivism rate across all prison cohorts.³⁰⁷ The figures are illuminating.³⁰⁸

301. See *infra* Section V.A.

302. See *infra* Part V.

303. See *infra* text accompanying notes 304–06.

304. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85; The Osbourne Ass’n, *The High Costs of Low Risk: The Crisis of America’s Aging Prison Population* 1, 5 (July 2014), http://www.osborneny.org/images/uploads/printMedia/Osborne_Aging_WhitePaper.pdf; see also THE PEW CTR. ON THE STATES, *supra* note 116.

305. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 21; KiDeuk Kim & Bryce Peterson, *Aging Behind Bars: Trends and Implications of Graying Prisoners in the Federal Prison System*, URB. INST. 1, 5 (Aug. 2014), <http://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Improvements-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF>; see also OFFICE OF THE INSPECTOR GEN., *supra* note 78.

306. See Tina Chiu, *It’s About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*, VERA INST. JUST. (Apr. 2010), <http://archive.vera.org/sites/default/files/resources/downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>; AMERICAN CIVIL LIBERTIES UNION, *supra* note 85; Kim & Peterson, *supra* note 305; see also Matthew R. Durose, Alexia D. Cooper, & Howard N. Sayder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUST. STAT. (Apr. 2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

307. The Osbourne Ass’n, *supra* note 304.

308. See *infra* notes 309–24 and accompanying text.

The most recent wide-ranging data on recidivism is derived from a 2016 United States Sentencing Commission report.³⁰⁹ The study tracked 25,431 federal prisoners following release from prison in 2005.³¹⁰ The study noted that over the eight-year period following their release, almost half (49.3%) were re-arrested.³¹¹ When the recidivism rate is further broken down according to age at the time of release, the study noted that the rearrest rate for those below age twenty-one was highest, at 67.6%.³¹² This compared to 24.7% for the cohort of offenders released while aged between fifty-one to sixty years, and only 16% for the oldest cohort, sixty-one years and older.³¹³ The report also notes that the same pattern exists in relation to rearrest rates, according to the age of offenders at the time of sentencing: the older the offender at sentencing, the lower the rearrest rate.³¹⁴ Thus, the reoffending rate of offenders aged fifty and above is half that of the general prisoner release population.³¹⁵

The New York Department of Corrections also issued a report noting a strong correlation between an offender's age and the differences in recidivism rates.³¹⁶ The report compared the recidivism rates of 24,605 offenders following their release in 2010.³¹⁷ Within three years of release 2248 offenders were returned to prison for committing new crimes—149

309. Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. SENT'G COMMISSION (Mar. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

310. *Id.* at 3.

311. *Id.* at 5.

312. *Id.* at Appendix A-1.

313. *Id.*

314. *Id.* This is consistent with studies over a decade earlier: a 2004 analysis noted that the rate of recidivism amongst federal offenders dramatically declined with age. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, U.S. SENT'G COMMISSION (May 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf. Offenders aged fifty years and over comprised 9.5% of the total number of offenders who had recidivated within two years of release (24,335). *Id.* at 28. This compared to offenders aged twenty-one and younger who comprised 35.5%. This trend is continuing in more recent periods. See Hunt & Dumville, *supra* note 309.

315. See *supra* notes 309–14.

316. Ryang Hui Kim, *2010 Inmate Releases: Three Year Post Release Follow-up*, ST. N.Y. DEP'T CORRECTIONS & COMMUNITY SUPERVISION (June 2014), http://www.doccs.ny.gov/Research/Reports/2014/2010_releases_3yr_out.pdf.

317. *Id.* at iii.

were aged between fifty and sixty-four years, and only nine were sixty-five and older.³¹⁸ This compared to 479 offenders aged twenty-five to twenty-nine.³¹⁹ Thus, offenders aged fifty and over were the least likely to return for new crimes, comprising 7% of the total number of returns.³²⁰

The report indicates that this pattern is entrenched.³²¹ Between 1985 and 2010, there have been 618,062 prisoners released from prison, 91,982 of whom have been imprisoned for new convictions within the three years of release.³²² Offenders aged between fifty and sixty-four years of age comprised 6.6% (2,014) of reconvictions and those aged sixty-five years and older comprised only 4.1% (ninety-two).³²³ This compared to offenders aged between twenty-five and twenty-nine years old who comprised 17.3% (22,590) of the total number of returns for new convictions.³²⁴

Importantly, the report notes very low levels of recidivism for violent and sexual offenses for aged offenders.³²⁵ Offenders aged fifty years or older were most likely to return to prison for committing nonviolent property and other crimes.³²⁶ This accounts for third-degree burglary, forgery, stolen property, grand larceny, driving intoxicated, and miscellaneous other felonies.³²⁷ They comprised 45.6% of prisoners who were returned to prison for such offenses.³²⁸ In contrast, aged prisoners were the least likely to be re-incarcerated for violent felony offenses (14.6%) and other coercive offenses (11.4%).³²⁹ When the recidivism rate is broken down further, *no* aged prisoners were returned to prison for murder or rape offenses, of a total

318. *Id.* at 3, 51.

319. *Id.* at 51.

320. *Id.* This report included 158 new commitments for those aged fifty and above and 2248 new commitments total. *Id.*

321. *See infra* notes 322–24 and accompanying text.

322. Kim, *supra* note 316, at 52.

323. *Id.* at 16.

324. *Id.*

325. *Id.* at 17; *see also* AMERICAN CIVIL LIBERTIES UNION, *supra* note 85 (noting that not only were New York's aging released prisoners less likely to recidivate, but they also rarely recidivated by committing violent offenses).

326. Kim, *supra* note 316, at 17.

327. *Id.*

328. *Id.*

329. *Id.*

of forty-three prisoners newly convicted of these charges.³³⁰

In determining the likely future conduct of offenders, it is also useful to consider the conduct of prisoners whilst incarcerated.³³¹ Older prisoners commit much less misconduct as compared to younger cohorts.³³² In 2013, aging inmates comprised 19% of the total federal prison population yet accounted for only 10% of the total number of misconduct incidents (5621 of the 53,885 incidents reported).³³³ Further, misconduct engaged in by older prisoners is most often not by means of violent or aggressive behavior.³³⁴

Thus, the vast majority of aged prisoners released from prison do not return.³³⁵ The empirical data has clearly established that age has a profound impact on the likelihood of a person engaging in criminal behavior.³³⁶ It is clear that by the age of fifty, a prisoner is unlikely to recidivate, and there is even less chance that the prisoner will recidivate by committing a violent offense.³³⁷ Thus, aged offenders pose only a small risk to public safety yet remain in prison, serving no further purpose so far as enhancing community safety is concerned.³³⁸

The data is consistent with patterns in Australia.³³⁹ A wide-ranging study of the trajectory of offenders was released in 2007, in a report titled, *Who Returns to Prison? Patterns of Recidivism Among Prisoners Released from Custody in Victoria in 2002–03*.³⁴⁰ The study analyzed the patterns of

330. *Id.*

331. OFFICE OF THE INSPECTOR GEN., *supra* note 78.

332. *Id.* at 37–38.

333. *Id.* at 16, 38.

334. *Id.* (“For example, a Social Worker told us that an aging inmate with dementia engaged in a misconduct incident by not standing up during the daily inmate count. Another Case Manager said that if aging inmates engage in misconduct incidents it is more likely to be for refusing to participate in programs, often because they are not motivated.” The report also notes that “over a year ago, the Department concluded that aging inmates are generally less of a public safety threat”).

335. *Id.* at 38.

336. *Id.* at 38–39.

337. *Id.* at 39.

338. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at vi (noting that “arrest rates drop to just over 2% at age 50 and are almost 0% at age 65”); *see also* Chettiar & Bunting, *supra* note 83.

339. *See infra* note 340.

340. Shasta Holland & Kym Pointon, *Who Returns to Prison? Patterns of Recidivism Among Prisoners Released from Custody in Victoria in 2002–03*, RES. & EVALUATIONS UNIT, DEP’T OF JUST., (Apr. 2007), <https://view.officeapps.live.com/op/view.aspx?src=http://assets.justice.vic.gov>.

recidivism amongst prisoners released from Victorian prisons during the 2002–2003 financial year.³⁴¹ Recidivism was defined as “a return to prison as a result of further offending within two years of release.”³⁴² The study noted that of the 3352 prisoners that made up the study cohort, 1,162 were convicted of further offenses and returned to prison within two years of release (35%).³⁴³

The study also confirmed that recidivism rates vary considerably according to the age of the prisoner at the time of his or her release.³⁴⁴ The older a prisoner was, the less likely he or she was to return to prison.³⁴⁵ It was noted that the reimprisonment rate for prisoners aged fifty years or older was only 4.2%, compared to 55.7% of offenders aged seventeen to twenty, and 28.6% of offenders aged thirty-five to thirty-nine returning to prison for reoffending within two years.³⁴⁶ Moreover, the study notes that “each additional year of age reduces the likelihood of returning to prison by 0.09 times. Therefore, prisoners aged [forty-seven] years are 2.7 times less likely to return to prison than prisoners aged [seventeen] years.”³⁴⁷ The study concluded that a prisoner’s age at the time of his or her release was a key factor, which significantly predicted the odds of a prisoner returning to prison within two years.³⁴⁸ The likelihood of recidivism reducing with age is

au/corrections/resources/859dfc28-cbac-45ba-8bb2-f986b2dc904d/who_returns_to_prison1.doc.

341. *Id.*

342. *Id.* at 6.

343. *Id.* A surprising finding was that prisoners who had served sentences more than two years had the lowest rates of reimprisonment within two years of their release—15%. *Id.* In contrast, prisoners who had served a sentence between six to twelve months had the highest rate—43%. *Id.*

344. *Id.* at 14.

345. *Id.* at 15.

346. *Id.*

347. *Id.* at 17.

348. *Id.* at 6. These findings are similar to those noted in a 1995 study for the NSW Department of Corrective Services. The study measured the recidivism rate of those discharged in 1990 to 1991 within two years from release and also found an inverse relationship between recidivism and age: younger prisoners were reimprisoned at higher rates than older prisoners. The study also supported the finding that recidivism was relatively high for those whose most serious offense was either assault or property-related. B. Thompson, *Recidivism in NSW: General Study*, NSW DEP’T CORRECTIVE SERVICES (Res. Publication No. 31, May 1995); see also Jason Payne, *Recidivism in Australia: Findings and Future Research*, AUSTL. INST. CRIMINOLOGY (Res. & Pub. Pol’y Series No. 80, 2007), http://www.aic.gov.au/media_library/publications/rpp/80/rpp080.pdf.

illustrated in the following table.³⁴⁹

Table 4. Proportion of cohort returning to prison within 2 years of release by age

	N	%
17 to 20 years	83	55.7
21 to 24 years	289	44.7
25 to 29 years	345	42.2
30 to 34 years	244	34.6
35 to 39 years	114	28.6
40 to 44 years	53	19.0
45 to 49 years	26	15.8
50 years & over	8	4.2

The correlation between the passing of age and lower offending rates is not stark.³⁵⁰ There appear to be two reasons for this phenomenon. The first is that people become less aggressive and more risk averse as they get older.³⁵¹ The second is simply a physical reality. As has been noted in relation to the elderly:

Recidivism studies consistently show declining rates of crime with age. Those who are bedridden or in wheelchairs are not likely to go on crime sprees It is worth asking: What do we as a society get from keeping these people in prison? People like the [eighty-seven]-year-old I met who had an “L” painted on his left shoe and an “R” on his right so he would know which was which and who didn’t even seem to know he was in prison. Or the old men I watched play bingo in a prison day room who needed staff members to put the markers on the bingo cards for them.³⁵²

349. Holland & Pointon, *supra* note 340.

350. *Id.*

351. See Mara Mather, *Risk Preferences and Aging: The “Certainty Effect” in Older Adults’ Decision Making*, 27 PSYCHOL. AGING 801–16 (Dec. 2012).

352. Jamie Fellner, *Graying Prisoners*, N.Y. TIMES (Aug. 18, 2013), <http://www.nytimes.com/2013/08/19/opinion/graying-prisoners.html>.

B. Detaining Older Offenders Is More Expensive

The fastest growing cohort of prisoners is also the most expensive.³⁵³ Currently, \$16 billion per year is spent on incarcerating prisoners aged fifty years and older.³⁵⁴ Research has consistently shown that aging inmates cost at least twice as much to incarcerate than the average prisoner and, in some cases, up to nine times more.³⁵⁵ Specifically, the 2012 American Civil Liberties Union report, which provided a comprehensive analysis of the federal and state incarceration of aging prisoners, found that the cost to accommodate the average prisoner was \$34,135 annually.³⁵⁶ This is compared to \$68,270 for a prisoner aged fifty years or older.³⁵⁷

This discrepancy in the cost of incarceration is primarily driven by the greater medical and healthcare needs of aging inmates.³⁵⁸ Older inmates are more susceptible to and have higher rates of cognitive impairments, mental illness, chronic health conditions, and a range of physical disabilities associated with age, including, for example, arthritis, dementia, and hypertension.³⁵⁹ It has been reported that prisoners older than fifty-five have an average of three chronic conditions and as many as 20% have a mental illness.³⁶⁰ In a separate 2008 survey, it was noted that 46% of male prisoners fifty years or older and 82% of prisoners sixty-five years or older have a chronic physical problem.³⁶¹ Thus, inevitably, there is a greater need for

353. See HUMAN RIGHTS WATCH, *supra* note 11, at 72–73.

354. Daniel Arkin, *Exploding Number of Elderly Prisoners Strains System, Taxpayers*, NBC NEWS (June 29, 2013), http://usnews.nbcnews.com/_news/2013/06/29/19192029-exploding-number-of-elderly-prisoners-strains-system-taxpayers?lite; Christine Vestal, *For Aging Inmates, Care Outside Prison Walls*, PEW CHARITABLE TR. (Aug. 12, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/08/12/for-aging-inmates-care-outside-prison-walls>.

355. HUMAN RIGHTS WATCH, *supra* note 11, at 72–73.

356. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85.

357. *Id.*; see also Chettiar & Bunting, *supra* note 83; Tina Chiu, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. JUST. (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

358. Chiu, *supra* note 306, at 5.

359. *Id.*

360. See HUMAN RIGHTS WATCH, *supra* note 11; Chiu, *supra* note 306.

361. Anthony A. Sterns et al., *The Growing Wave of Older Prisoners: A National Survey of Older Prisoner Health, Mental Health and Programming*, RESEARCHGATE (Jan. 2008), https://www.researchgate.net/publication/236121499_The_Growing_Wave_of_Older_Prisoners_A_National_Survey_of_Older_Prisoner_Health_Mental_Health_and_Programming.

medical services, equipment, medications, and assistance, and accordingly, these prisoners require substantial costs to care for them as a result of their increased burden of both mild and serious health conditions.³⁶²

The alarmingly high costs of providing basic medical care to aged prisoners is highlighted in the American Civil Liberties Report:

[O]ne [seventy-two]-year-old woman in a California prison suffers from emphysema, heart disease, and arthritis and is incapable of walking more than [fifty] feet without stopping to catch her breath. The total cost of her heart treatment alone is \$750,000. The state must prepare her special medical diets, provide a prison cell that can accommodate her disability, and hire additional staff members to provide daily caretaking and monitoring.³⁶³

The Human Rights Watch Report also undertook an analysis of the burden of age on state prisons and its impact on healthcare costs.³⁶⁴ It noted that despite aged offenders comprising 16% of the total prison population in Florida in 2010, they accounted for almost 50% of all hospital days and 40% of all instances where care was needed. In the same year, Texas state prisons spent \$4,853 on healthcare for each prisoner aged fifty-five years and older.³⁶⁵ The healthcare cost of a prisoner aged fifty-four years and younger was \$795.³⁶⁶

It has been estimated that approximately one quarter of the national annual sum spent on aging prisoners (that is \$3 billion of the total \$16 billion spent) is devoted solely to providing healthcare to sick or dying prisoners.³⁶⁷ Further research has indicated that the individual healthcare costs of an average prisoner was \$5,482.³⁶⁸ However, that amount increased to \$11,000 for a prisoner aged between fifty-five and fifty-nine years, and \$40,000 for a prisoner aged eighty years and older.³⁶⁹

362. See *supra* notes 354–61 and accompanying text.

363. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85.

364. HUMAN RIGHTS WATCH, *supra* note 11.

365. *Id.* at 77.

366. *Id.*

367. Arkin, *supra* note 354.

368. HUMAN RIGHTS WATCH, *supra* note 11, at 75.

369. *Id.*

A 2015 U.S. Department of Justice report that conducted a review of the impact of federal aging prisoners provided further insight into the medical conditions of aging inmates.³⁷⁰ For example: “One aging inmate told us that he has had two heart attacks, two strokes, open-heart surgery, cancer, and has diabetes. He told us that it must cost the BOP ‘a fortune’ to keep him incarcerated.”³⁷¹ The report calculated that by Fiscal Year 2013, \$1.1 billion was spent on the medical costs of federal aging inmates, accounting for 17% of its total budget for that year (\$6.5 billion).³⁷² This compared to \$854 million in Fiscal Year 2009, which accounted for 16% of its annual budget (\$5.5 billion).³⁷³ This is a 29% increase over a four-year period in medical expenses alone.³⁷⁴

Prisons are not designed to be nursing or medical facilities, and for this reason, many have also experienced the added costs of hiring additional specialized staff, such as nurses in palliative care, to provide satisfactory care.³⁷⁵ In some circumstances, separate prison wards or “older prisoner units” have been created to house and care for aging prisoners.³⁷⁶ As of 2006, it had been reported that “[a]t least [sixteen] states provide[d] separate housing facilities for older prisoners; in seven states, these housing units [were] reserved for elderly inmates with special medical needs.”³⁷⁷ As of 2008, at least thirteen states had units solely for aging prisoners, six had prisons entirely dedicated to aging prisoners, nine had medical facilities dedicated to aging prisoners, five had nursing-home facilities, and eight had hospice facilities.³⁷⁸

Of course, older people in the community incur more health costs than younger people.³⁷⁹ Thus, if the older inmates were in the community, they

370. OFFICE OF THE INSPECTOR GEN., *supra* note 78.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. Baidawi et al., *supra* note 130, at 4.

376. *Id.* at 50.

377. Abner, *supra* note 80, at 10.

378. HUMAN RIGHTS WATCH, *supra* note 11, at 51.

379. *Id.* at 75; see also Berhanu Alemayehu & Kenneth E. Warner, *The Lifetime Distribution of Health Care Costs*, 39 HEALTH SERVS. RES. 627, 627 (2004).

would be responsible for a disproportionate burden on the health budget.³⁸⁰ But the fiscal burden is still significantly more if they are in jail.³⁸¹ Caring for an incarcerated individual, as opposed to a nonincarcerated individual of the same age, is also far more expensive because there are additional layers of costs, such as transportation and security.³⁸² The combination of poor facilities and incapable staff means that aged prisoners are often sent to external facilities to obtain treatment.³⁸³ In fact, aged prisoners visit healthcare facilities at five times the rate of nonincarcerated persons of the same age.³⁸⁴ Transporting aged prisoners to off-site medical facilities is expensive.³⁸⁵ “[I]n 2006, North Carolina spent \$18.1 million on external healthcare costs for all prisoners age [fifty] and older.”³⁸⁶ This comprised 72% of all healthcare costs incurred by the state prison.³⁸⁷

Thus, harsh sentencing policies and a growing number of life sentences are effectively seeing many prisons turned into nursing homes to detain prisoners who have virtually no likelihood of committing more crime if released, given their medical conditions and age-related infirmities.³⁸⁸ The cost of caring and housing aging offenders is borne by the states, as the aging offenders are not eligible for federal health programs, such as Medicaid; however, by law, they are required to receive medical treatment.³⁸⁹ In 2013, California spent \$900 million building a 2950-bed care facility that was needed to meet its healthcare obligations and care for the growing number of elderly and ill patients.³⁹⁰ These costs are unsustainable and largely unnecessary to protect public safety.³⁹¹

The American Civil Liberties Union report further undertook a state

380. HUMAN RIGHTS WATCH, *supra* note 11, at 75.

381. *See infra* notes 382–86 and accompanying text.

382. HUMAN RIGHTS WATCH, *supra* note 11, at 79.

383. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 29.

384. Chiu, *supra* note 306, at 5.

385. HUMAN RIGHTS WATCH, *supra* note 11, at 79; The Osbourne Ass’n, *supra* note 304, at 2.

386. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 29.

387. *Id.*

388. *See* AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 47.

389. HUMAN RIGHTS WATCH, *supra* note 11, at 78.

390. Christine Vestal, *The Growing Cost of Aging Inmates: \$16B and Counting*, FISCAL TIMES (Aug. 12, 2014), <http://www.thefiscaltimes.com/Articles/2014/08/12/Growing-Cost-Aging-Inmates-16B-and-Counting>.

391. AMERICAN CIVIL LIBERTIES UNION, *supra* note 85, at 57.

fiscal impact analysis of releasing the average aging prisoner.³⁹² The most accurate estimate is that states will save an average of \$66,294 per year for every aged prisoner that is released.³⁹³ This figure takes into consideration the fiscal impact state governments would face in increased costs of parole, housing, monitoring costs, public benefits (including healthcare), and emergency room visits.³⁹⁴ The analysis provided a low, middle and high estimate.³⁹⁵ Even at the lowest end, which assumes that prisoners in this group are healthy and do not require healthcare, states will save at least \$28,362 per year for every released aged prisoner.³⁹⁶ This is the same annual cost as an average prisoner.³⁹⁷ The analysis concludes that security, healthcare, and housing costs are far higher in prison than on the outside.³⁹⁸

Relatively little research has been undertaken in Australia.³⁹⁹ However, the research that has been undertaken follows that the increased burden of illness, disability, and special needs among older prisoners is having a significant impact on Australian correctional budgets. According to a 1999 Australian Institute of Criminology report, *Elderly Inmates: Issues for Australia*, the cost of incarcerating an aged prisoner is approximately three times more expensive than a younger prisoner.⁴⁰⁰

C. Older Offenders Suffer More in Jail

A second reason for reducing penalties for aged offenders is because they generally find prison more burdensome due to a number of individual and environmental stressors intrinsic to them.⁴⁰¹ Older persons, by virtue of

392. *Id.* at 26–38.

393. *Id.* at 37.

394. *Id.* at 38.

395. *Id.* at 37.

396. *Id.*

397. *Id.* at 27.

398. *Id.* at 57.

399. *But see infra* note 400 and accompanying text.

400. Anna Grant, *Elderly Inmates: Issues for Australia* AIC, 115 AUSTL. INST. CRIMINOLOGY 4 (May 1999), http://aic.gov.au/media_library/publications/tandi_pdf/tandi115.pdf; Chris Angus, *Older Prisoners: Trends and Challenges*, NSW PARLIAMENTARY RES. SERV. (Oct. 2015), <https://www.parliament.nsw.gov.au/researchpapers/Documents/older-prisoners-trends-and-challenges/Older%20prisoners%20-%20trends%20and%20challenges.pdf>.

401. Grant, *supra* note 400, at 5; *see also* Abner, *supra* note 80, at 10.

their age, are more likely to develop age-related illnesses and infirmities.⁴⁰² However, the decline in health is exacerbated when it is coupled by the effects of incarceration, and thus, as a result, incarcerated older persons have a heightened risk of chronic illnesses, cognitive limitations, and physical disabilities.⁴⁰³

It has been noted that aged persons who are incarcerated are more likely to suffer from mild and chronic illnesses than both nonincarcerated persons of the same age and younger prisoners.⁴⁰⁴ According to a recent Bureau of Justice Statistics report, older prisoners are about 2.5 times more likely than younger prisoners to report ever having a chronic condition.⁴⁰⁵ Specifically, 72.6% of state and federal prisoners aged fifty years or older reported ever having a chronic medical condition.⁴⁰⁶ By comparison, only 27.5% of prisoners aged eighteen to twenty-four and 40.9% of prisoners aged twenty-five to thirty-four reported having such a condition.⁴⁰⁷ Further reports note that inmates older than fifty-five have an average of three chronic conditions during their term of imprisonment.⁴⁰⁸ In addition to having a heightened risk of experiencing chronic illnesses, older prisoners are more prone to developing mobility impairments and gross functional disabilities.⁴⁰⁹

It has also been observed that older prisoners are more susceptible to age-related cognitive impairments—including dementia and Alzheimer's—than both younger prisoners and nonincarcerated older persons.⁴¹⁰ This is

402. See Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 43 STETSON L. REV. 197, 197–98 (2013).

403. See Baidawi et al., *supra* note 130, at 4.

404. Laura M. Maruschak, Marcus Berzofsky, & Jennifer Unangst, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12*, BUREAU JUST. STAT. 5 (Feb. 2015), <http://www.bjs.gov/content/pub/pdf/mpsfjil112.pdf>. This includes conditions such as heart problems, hypertension, high-blood pressure, and cancer. *Id.*; see Ferri, *supra* note 402, at 197; Chiu, *supra* note 306, at 5; see also PEW CHARITABLE TRS., *supra* note 123, at 11.

405. Maruschak, *supra* note 404, at 55. The Bureau of Justice Statistics classifies the following as chronic conditions: cancer, high-blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and cirrhosis of the liver. *Id.* at 1.

406. *Id.* at 5.

407. *Id.*

408. Chiu, *supra* note 306, at 5; Abner, *supra* note 80, at 10.

409. HUMAN RIGHTS WATCH, *supra* note 11, at 6–7; Chiu, *supra* note 306, at 5.

410. Pam Belluck, *Life, With Dementia*, N.Y. TIMES (Feb. 25, 2012), <http://www.nytimes.com/2012/02/26/health/dealing-with-dementia-among-aging-criminals.html>; see also HUMAN RIGHTS

particularly in the case of dementia.⁴¹¹ Although the exact prevalence rate is unclear, there is a consensus among the literature that the number of older prisoners suffering from dementia continues to grow rapidly, despite remaining largely unnoticed and undiagnosed.⁴¹² One reason for this lack of diagnosis is because the symptoms associated with the disorder (which are exacerbated by incarceration) are often difficult to recognize within the regimented prison setting, and most prisons do not screen prisoners for cognitive decline.⁴¹³ Further, prison staff lack the understanding and ability to discern the difference between intentional misconduct and misconduct resulting from the cognitive illness.⁴¹⁴ For example, prisoners suffering from dementia may disobey orders unwillingly and consequently are subject to punishment by staff and victimization by other inmates, which further compromises their well-being.⁴¹⁵

This suffering is compounded by prisons' lack of understanding and inability to meet the unique and demanding healthcare needs of older prisoners.⁴¹⁶ The Inspector General report highlights numerous shortcomings by the federal system in caring for its prisoners age fifty and older.⁴¹⁷ For example, despite having an increased need for day-to-day assistance with basic tasks, such as dressing, carrying meals, and walking, prison staff are not responsible for ensuring that they complete these tasks.⁴¹⁸ In fact, prison staff reported that they were not trained in understanding or identifying the signs of aging, and thus, and as mentioned above, many symptoms and conditions are overlooked and left untreated.⁴¹⁹

Even in the absence of any gross-functional disabilities or chronic health problems, the prison environment, by design, can create unique hardships for

WATCH, *supra* note 11, at 6; The Osbourne Ass'n, *supra* note 304, at 3; Ferri, *supra* note 404; John Wilson & Sharen Barboza, *The Looming Challenge of Dementia in Prisons*, CORRECT CARE, 12–13 (2010), http://www.ncchc.org/filebin/images/Website_PDFs/24-2.pdf.

411. Ferri, *supra* note 404, at 206.

412. See Belluck, *supra* note 410; HUMAN RIGHTS WATCH, *supra* note 11, at 52; Ferri, *supra* note 404, at 206.

413. HUMAN RIGHTS WATCH, *supra* note 11, at 52.

414. *Id.*; The Osbourne Ass'n, *supra* note 304, at 3–4.

415. The Osbourne Ass'n, *supra* note 304, at 4; Belluck, *supra* note 410.

416. See *infra* notes 418–45 and accompanying text.

417. See *infra* notes 418–25 and accompanying text.

418. OFFICE OF THE INSPECTOR GEN., *supra* note 78, at 19.

419. *Id.* at ii; see also KiDeuk & Peterson, *supra* note 305, at 22–23.

older prisoners.⁴²⁰ The typical prison structure is physically challenging for older prisoners who are experiencing a decline in strength and mobility that accompanies the normal aging process.⁴²¹ For example, most prison units are multi-story, requiring prisoners to climb stairs, and they must also walk long distances to access meals, activities, and other essential services, which are often scattered amongst the prison grounds.⁴²² Further, the prison structure is not conducive to the special devices older persons more commonly require to function, such as walking frames and wheelchairs.⁴²³ There is a lack of wheelchair-accessible rooms and doorways wide enough to accommodate such devices, effectively making prison an inaccessible environment for many aged prisoners.⁴²⁴ An aged prisoner reported to the Inspector General that “his unit house[d] approximately 160 inmates, with only one handicapped-accessible toilet,” often forcing wheelchair-bound inmates to line up to use the stall.⁴²⁵

For prisoners who are infirm and frail there are also additional hazards that are unique to the prison environment.⁴²⁶ For example, the Inspector General report observed that due to overcrowding, older prisoners are forced to sleep in top bunks, even though they are unable to get up without injuring themselves.⁴²⁷ The report also noted, “During our visits to BOP institutions, we observed upper bunks that did not have ladders or steps, which required inmates to climb on desks, chairs, or makeshift pedestals to access the upper bunks.”⁴²⁸

The Inspector General report further details the lack of accessibility for aged prisoners:

The physical infrastructure of BOP institutions cannot adequately house aging inmates. Aging inmates often require lower

420. See *infra* notes 421–25 and accompanying text.

421. HUMAN RIGHTS WATCH, *supra* note 11, at 47.

422. *Id.*

423. *Id.*

424. *Id.*

425. OFFICE OF THE INSPECTOR GEN., *supra* note 78, at 27.

426. See *infra* notes 427–33 and accompanying text.

427. HUMAN RIGHTS WATCH, *supra* note 11, at 46; OFFICE OF THE INSPECTOR GEN., *supra* note 78, at 24.

428. OFFICE OF THE INSPECTOR GEN., *supra* note 78, at 24.

bunks or handicapped-accessible cells, but overcrowding throughout the BOP system limits these types of living spaces. Aging inmates with limited mobility also encounter difficulties navigating institutions without elevators and with narrow sidewalks or uneven terrain. The BOP has not conducted a nationwide review of the accessibility of its institutions since 1996.⁴²⁹

Lastly, the prison environment can be a threatening environment for aged prisoners.⁴³⁰ They are more easily susceptible to victimization because they are vulnerable, by reason of their advanced age, infirmities, and illnesses.⁴³¹ A 2004 National Institute of Corrections report notes abuse and predation by younger inmates is a common challenge that is intensified by the prison setting.⁴³² The abuse suffered by older prisoners ranges from physical harm, such as assault, rape, and homicide, to harassment in the form of extortion, theft, or humiliation.⁴³³

VI. TWO CONSIDERATIONS THAT SHOULD BE REJECTED AS REASONS FOR PUNISHING THE AGED MORE LENIENTLY

A. *The “Older Age Makes Years More Precious” Fallacy*

As noted above, it has been suggested that advanced age should result in reduced penalties because as people become older, each year is a smaller portion of the remainder of their lives and hence becomes more precious.⁴³⁴ The first part of this premise is correct: the elderly normally have less years to live than younger people.⁴³⁵ But it is not clear that as a result of this, each elderly year is more special or precious, and hence more harmful to take away than in the case of a younger person.⁴³⁶

429. *Id.* at ii.

430. *Id.* at 22–23. Aware of the increased vulnerabilities of aged prisoners, the BOP approved the hiring of more social workers and implemented sections dedicated to “recognizing the signs of aging” into their Annual Refresher Training. *Id.* at 22.

431. *Id.*; see also Abner, *supra* note 80, at 10.

432. Abner, *supra* note 80, at 10.

433. HUMAN RIGHTS WATCH, *supra* note 11, at 58.

434. See generally *supra* Part IV; see also *supra* notes 192–93 and accompanying text.

435. See *supra* notes 192–93 and accompanying text.

436. See *infra* notes 437–48 and accompanying text.

Age is a continuum, and the human life span is about eighty years.⁴³⁷ Biological realities and cognitive capabilities dictate that the opportunities for engaging in certain forms of conduct are age dependent.⁴³⁸ Thus, from birth to late teens, individuals are nurtured and subject to a large degree of paternalistic intervention regarding their activities as their brains, cognitive skills, and physical capacities develop.⁴³⁹ From one's twenties to forties, an individual generally has the biological capacity and cognitive skills to pursue any activity he wishes.⁴⁴⁰ It is at this stage that people define their career, financial, and familial expectations.⁴⁴¹ Beyond age fifty, people's option to bear children is decreased, people have diminished physical prowess, and most verge towards retirement.⁴⁴² There are obvious exceptions to each of these age cohorts, but the indisputable reality is that, post-fifty, the framework for one's life has been largely set.⁴⁴³ There is less opportunity to have additional (biological) children, one's career trajectory is developed, and the prospect of many lifestyle choices—such as professional athleticism—is lost.⁴⁴⁴

Given that the years before fifty are those where the breadth of choices are most expansive and are, in effect, largely life-planning decisions, a strong argument can be made that these are the most important years in one's life cycle.⁴⁴⁵ Incarceration during this phase dooms a person to having no family or meaningful career.⁴⁴⁶

437. *Life Expectancy at Birth, Total (Years)*, *supra* note 68.

438. LARRY D. BARNETT, *LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOLOGICAL PERSPECTIVE ON LAW* 73 (1993).

439. Kendra Cherry, *Piaget's Theory: The 4 Stages of Cognitive Development*, VERYWELL (Feb. 17, 2017), <https://www.verywell.com/piagets-stages-of-cognitive-development-2795457>.

440. *See* BARNETT, *supra* note 438, at 73.

441. *See id.* at 74.

442. *Id.*

443. *See id.* at 73–74.

444. *See id.*

445. *See generally* BARNETT, *supra* note 438, at 73; *see also* Steven Mintz, *What Are the Most Important 10 Years of Your Life?*, *PSYCHOL. TODAY* (Apr. 4, 2015), <https://www.psychologytoday.com/blog/the-prime-life/201504/what-are-the-most-important-10-years-your-life> (arguing that “[t]he 10 years from 18 to 28 comprise the most pivotal decade in a person's life”).

446. Kolina J. Delgado, *The Impact of Incarceration on Families: A Summary of the Literature*, *WRIGHT ST. U. CORE SCHOLAR* 5 (2011), http://corescholar.libraries.wright.edu/cgi/viewcontent.cgi?article=1004&context=psych_student (“Research suggests that 45% of inmates lose contact with their families during their incarceration and 22% of married inmates divorce or

From an emotional perspective, the prospect of growing old in prison is uncomfortable, but logically, the prospect of being denied an opportunity to set up one's life and explore one's potential is perhaps even more harmful.⁴⁴⁷ Certainly, there is no demonstrable basis for asserting that time in prison in one's latter years is more burdensome and painful as at other times of one's life.⁴⁴⁸

B. *The "Right to Hope" Fallacy*

Another argument that has been advanced in favor of leniency for the elderly is that a crushing sentence, which might result in the offender dying in prison, abrogates the right to hope.⁴⁴⁹ In the sentencing context, the concept of the right to hope was raised most directly by the European Court of Human Rights in the decision of *Vinter and Others v. United Kingdom*.⁴⁵⁰ In this case, the court considered whether a term of life imprisonment—having no prospect of being reviewed or reduced—breached Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading treatment.⁴⁵¹ In doing so, the court stated:

[H]ope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.⁴⁵²

separate.”). *See generally Study Shows Ex-Offenders Have Greatly Reduced Employment Rates*, PRISON LEGAL NEWS (Dec. 15, 2011), <https://www.prisonlegalnews.org/news/2011/dec/15/study-shows-ex-offenders-have-greatly-reduced-employment-rates/>.

447. *See supra* notes 437–46 and accompanying text.

448. *See supra* notes 434–47 and accompanying text.

449. *See* Kanstantsin Dzehtsiarou, *Is There Hope for the Right to Hope?*, VERFASSUNGSBLOG ON MATTERS CONST. (Jan. 19, 2017), <http://verfassungsblog.de/is-there-hope-for-the-right-to-hope/>.

450. *Vinter and Others v. United Kingdom*, App. Nos. 66069/09, 130/10, & 3896/10 Eur. Ct. H.R. (2012). The scope of the decision was watered down in the subsequent case of *Hutchinson v. United Kingdom*, App. No. 57592/08 Eur. Ct. H.R. (2003).

451. *See generally Vinter*, App. Nos. 66069/09, 130/10, & 3896/10 Eur. Ct. H.R.

452. *Id.* at 54.

Beyond these comments, there is no firm jurisprudential normative or jurisprudential basis for the “right to hope,” and it can be persuasively argued that the concept is illogical, or at least superfluous.⁴⁵³ Hope represents a wish or desire regarding a future state of affairs.⁴⁵⁴ By contrast to an expectation, it is not circumscribed by the realities or the cause-and-effect systems of the world.⁴⁵⁵ Thus, it is not clear that the capacity to hope can ever be negated by the actions of others.⁴⁵⁶ Accordingly, describing hope as a “right” seems to be futile; it is beyond the control of others, and thus, in no need of protection.⁴⁵⁷

The right to hope has also not been endorsed in United States jurisprudence.⁴⁵⁸ Most notably, the Supreme Court upheld the legality of life sentences without any prospect of release, and in doing so, it held that these sanctions generally do not violate the Eighth Amendment’s Cruel and Unusual Punishment prohibitions.⁴⁵⁹ Most states allow life without parole as a punishment, and some require it as a punishment for certain crimes.⁴⁶⁰ In

453. See generally Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257 (2006) (discussing the existence of nonsensical rights).

454. See WEBSTER’S NEW WORLD, COLLEGE DICTIONARY 687 (4th ed. 2004) (defining *hope* as “a feeling that what is wanted is likely to happen; desire accompanied by expectation”).

455. See Thais Helene Downman, *Hope and Hopelessness: Theory and Reality*, 101 J. ROYAL SOC’Y OF MED. 428, 428–29 (Aug. 1, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2500241/pdf/428.pdf> (discussing the difference between “realistic hope” and “unrealistic hope”).

456. *Id.* (stating that unrealistic hope “involves a failure to clearly assess what can be changed and what cannot be changed”).

457. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., Yale University Press 1920). Wesley Newcomb Hohfeld defined four categories of rights: claim-rights, privileges, powers, and immunities. *Id.* at 36, 38. He qualifies this by stating that only a claim-right accords with the proper meaning of the term. *Id.* at 38. For a discussion about the existence of nonsense rights, see Bagaric & Allan, *supra* note 453.

458. J.M. Kirby, *Graham, Miller, & the Right to Hope*, 15 CUNY L. REV. 149, 151, 155–61 (2011) (discussing Supreme Court decisions that referenced a “right to hope” for juveniles and adults facing enhanced sentences).

459. *Id.* at 159; see, e.g., *Conley v. State*, 972 N.E. 2d 864, 880 (Ind. 2012) (upholding the appellate court in sentencing a seventeen-year-old to life in prison without parole).

460. Julian Wright Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 540–41 (1990). Wright states, “[a]t least thirty states use life-without-parole in some form as the actual or possible sentence for convictions of the type of murder that each state deems most serious.” *Id.* at 540. Six different approaches exist:

(1) [A] triple tiered approach in which a murderer may be sentenced to death, [life

the state of Georgia, a unique view is taken: the prosecution can seek a sentence of life without parole solely as an alternative to the death penalty and, therefore, cannot seek life without parole without first filing intent to seek the death penalty.⁴⁶¹ This view recognizes the burden that a sentence of life without parole imposes on a prisoner.⁴⁶² In other states, the opposite is true: for example, California has a “three-strikes” law, which imposes a mandatory sentence of life without parole for at least twenty-five years for a third-time felony conviction, so long as the first two felonies were violent or “serious.”⁴⁶³

While the United States jurisprudence generally allows for life sentences without the prospect of release, for certain groups of offenders greater protections exist, and this sentence is viewed as unconstitutional.⁴⁶⁴ In *Graham v. Florida*,⁴⁶⁵ the Supreme Court held that the imposition of a life sentence without the possibility of parole on a juvenile offender who did not commit homicide is cruel and unusual punishment under the Eighth Amendment.⁴⁶⁶ Two years later, the Supreme Court held that a *mandatory* sentence of life imprisonment without the possibility of parole for juvenile offenders (even those who committed homicide) was cruel and unusual punishment under the Eighth Amendment and therefore unconstitutional.⁴⁶⁷ Despite these growing protections, the United States can still legally sentence juvenile offenders to sentences of life without parole for

without parole (LWOP)], or regular life; (2) a triple tiered approach in which the options are death, LWOP for a set minimum of years, or regular life; (3) a double tiered approach in which the options are death or LWOP; (4) a double tiered approach in which the options are death or LWOP for a term of years; (5) a double tiered approach in which the sentencer may choose only between LWOP or regular life; and (6) a single tiered approach in which LWOP is the only available sentence.

Id. at 540–41.

461. *State v. Ingram*, 467 S.E. 2d 523, 524 (Ga. 1996).

462. *Id.* at 525; *see also* Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1106 (2013) (discussing the “moral intelligibility of life without parole”).

463. *See* Michale Vitiello, *Reforming Three Strikes’ Excesses*, 82 WASH. U. L.Q. 1, 1 n.1 (2004) (discussing the provisions of California’s Three Strikes law and critiquing its effectiveness in the criminal justice system).

464. *See* Lerner, *supra* note 462, at 1103–04.

465. 560 U.S. 48 (2010).

466. *Graham*, 560 U.S. at 74–75.

467. *Miller v. Alabama*, 132 S. Ct. 2455, 2457–58 (2012).

homicide.⁴⁶⁸ In fact, “the United States is the only country in the world that currently incarcerates juvenile offenders for life without the possibility of parole.”⁴⁶⁹ While the ethical soundness of these penalties is highly questionable, the fact that they are lawful and imposed without even passing reference to the right to hope casts doubt on the existence of such a right.⁴⁷⁰

While the right to hope is intellectually and jurisprudentially challenged, there is perhaps some substance to the sentiment underlying the notion.⁴⁷¹ Human beings by nature are aspirational, constantly seeking to improve their environment.⁴⁷² A total annulment of this capacity is capable of causing considerable suffering.⁴⁷³ In fact, one view of morality holds that the core objective of human beings is to maximize their preferences.⁴⁷⁴ In addition, there is a well-accepted sentiment that people should not be subjected to oppressive conditions in their final stages of life.⁴⁷⁵ This is the underpinning of the “dying with dignity” concept that is the core of the argument in favor of voluntary euthanasia.⁴⁷⁶ Hence, there is arguably more merit to the claim that offenders should not be subjected to very lengthy terms of imprisonment, especially if it would most likely result in dying in custody.

The notions underpinning this sentiment have some basis in Australian sentencing law.⁴⁷⁷ They are grounded in the concept of a “crushing sentence,” which is sometimes used as a basis for not imposing consecutive

468. Beth Caldwell, *Globalization and Juvenile Life Sentences: Creating Meaningful Opportunities for Release for Juvenile Offenders*, 14 J. INST. JUST. INT’L STUD. 1, 3 (2014).

469. *Id.* at 1.

470. Kirby, *supra* note 458, at 153.

471. See Saskia K. Nagel, *Enhancement for Well-Being Is Still Ethically Challenging*, 8 FRONTIERS SYSTEMS NEUROSCIENCE 1, 1 (2014).

472. *Id.* at 1–2 (discussing the human condition to strive for well-being, improve one’s environment, and preserve quality of life).

473. *Id.* at 1 (noting that “[h]umans have always been fighting, with all the means at their disposal, against disease, pain, and unhappiness, fighting to increase their quality of life”).

474. See generally PETER SINGER, PRACTICAL ETHICS (2d ed. 1993).

475. Emily Mackenzie, *A Right to Hope? Extradition to the U.S. and Life Without Parole*, 19 AM. SOC’Y INT’L L. (Sept. 28, 2015), <https://www.asil.org/insights/volume/19/issue/22/right-hope-extradition-us-and-life-without-parole>.

476. See KUMAR AMARASKERA & MIRKO BAGARIC, EUTHANASIA, MORALITY AND THE LAW 37 (2002).

477. See Mirko Bagaric & Theo Alexander, *Rehabilitating Totality in Sentencing: From Obscurity to Principle*, 36 U. NEW S. WALES L.J. 139, 152 (2013).

sentences.⁴⁷⁸ This approach is known as the “totality principle.”⁴⁷⁹

A crushing sentence is commonly defined as one that destroys an expectation of a meaningful life after release. In *R v Beck* the Court described a crushing sentence (of nine and a half years imprisonment) as one which risked “provoking within the applicant a feeling of helplessness and the destruction of any reasonable expectation of a useful life after release.”⁴⁸⁰

However, there is no clear meaning of “crushing sentence.”⁴⁸¹ In *Haines v The Queen*, the court stated that in considering whether a sentencing is crushing, factors that are relevant include “maximum penalties, any standard non-parole periods, [and] the objective and subjective factors.”⁴⁸² Even these albeit vague factors do not exhaust the bounds of inquiry into whether a sentence is crushing.⁴⁸³ In *R v Vaitos*,⁴⁸⁴ Young CJ in examining whether a sentencing was crushing noted,

This question can only be answered in relation to the facts of the case. The answer cannot be arrived at mathematically by reference to the offender’s age and the length of sentence to be served. In the particular case of this applicant, having regard to the very large number of very serious offenses, and notwithstanding the severity of the effective sentence, I have come to the conclusion that the point has not been reached at which this Court is required to set aside the sentence as crushing.⁴⁸⁵

Even if it is possible to provide more clarity to the meaning and scope of a crushing sentence, it is evident that it is not a consideration that inclines meaningfully against harsh sentences.⁴⁸⁶ It is well established that “there is

478. *Id.* at 142, 151.

479. *Id.* at 142.

480. *Id.* at 151 (quoting *R v Beck*, (2012) NSWCCA 238, [57] (Austl.)).

481. *Id.*

482. *Id.* at 151 (quoting *Haines v The Queen* (2012) NSWCCA 238, [57] (Austl.)).

483. *Id.*

484. (1981) 4 A Crim R 238, 257 (Austl.).

485. *Vaitos*, 4 A Crim R at 257.

486. Bagaric & Alexander, *supra* note 477, at 152.

no question that in some instances a crushing sentence is appropriate and, in fact, must be imposed.”⁴⁸⁷ This even includes sentences of life imprisonment.⁴⁸⁸

While life sentences are crushing,⁴⁸⁹ they are sometimes imposed in relation to single offenses, such as murder.⁴⁹⁰ The concept of a crushing sentence logically does not operate as a considerable limitation to such penalties. Logically, it must impose an even lesser restraint in relation to the penalties imposed in cases involving multiple offenses.⁴⁹¹ It follows that at its highest, the concept of a crushing sentence is a weak consideration in the context of the totality principle.⁴⁹²

To this end, existing jurisprudence is correct that there is no such real right as “the right to hope” or prohibition against crushing sentences.⁴⁹³

VII. SOLUTIONS: OUTLINE OF REFORM PROPOSAL

There is no single solution to dealing with the runaway number of elderly prisoners.⁴⁹⁴ The main reason for this is that in broad terms, there are two cohorts of aged prisoners: those that enter prison at or after the age of fifty, and those that are imprisoned at an earlier age but become elderly due to a long prison sentence.⁴⁹⁵ To remedy this situation, there are a number of

487. *Id.* Also, it is clear that totality does not *only* apply in the case of potentially crushing sentences. See *Johnson v The Queen* (2004) 78 ALJR 616, 624 [22] (Austl.) (“We would with respect doubt that it is only in a case of an otherwise crushing burden of an aggregation of sentences that the totality principle may be applied.”).

488. See, e.g., *Paxton v The Queen* (2011) NSWCCA 242, [213] (Austl.) (citing *Ta’ala v The Queen* (2008) NSWCCA 132, [40–42] (Austl.)).

489. See *Paxton*, NSWCCA 242 at [213].

490. See *Roberts v The Queen* (2012) VSCA 313, [94] (Austl.). The principle of totality has limited application in such instances. See *id.* at [105].

491. See *Roberts*, VSCA 313 at [95] (showing that a cumulative look at all crimes an individual has been convicted of must be taken into account during sentencing).

492. See *Paxton*, NSWCCA 242 at [215] (listing the considerations other than the concept of a crushing sentence in reviewing sentences in total).

493. See *Hutchinson v. United Kingdom*, Eur. Ct. H.R. (2015) (showing no uniform prohibition on the right for states to impose life sentences without a chance of release). To the extent that crushing sentences are normative and jurisprudential, the most plausible and persuasive criticism should be based on the principle of proportionality. See Mirko Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, 25 NZULR 411 (2013).

494. See *infra* notes 495–43 and accompanying text.

495. See generally *supra* Part II.

necessary reforms.⁴⁹⁶ Some of them apply to both cohorts of elderly offenders while others are specific to only one cohort.⁴⁹⁷ We first deal with reforms that are applicable to the sentencing of all elderly offenders and, in fact, all offenders.⁴⁹⁸

A. Reforms that Would Result in Fewer Offenders Growing Old in Prison

As we have seen, the central reason for the increase in aged offenders in prisons is the same as the key cause for the increase in the United States' (and Australian) incarceration numbers: increasingly long prison terms.⁴⁹⁹ If many prisoners were sentenced to shorter terms, it would necessarily follow that less of them would get old in prison.⁵⁰⁰ Prison terms should not be reduced simply to lower incarceration levels, whether for elderly offenders or all offenders.⁵⁰¹ Prison has two beneficial outcomes: community protection and punishment infliction. These benefits should not be compromised without a principled foundation.⁵⁰² As it transpires, there are powerful normative and empirical reasons for imposing considerably less-harsh sentences for most offenses.⁵⁰³

Sentencing is a purposive endeavor with a number of different objectives.⁵⁰⁴ The sentencing system should aim to achieve the following four key goals: "(1) [t]o stop or reduce crime; (2) [t]o minimize the cost of the system; (3) [t]o punish criminals appropriately; and (4) [t]o ensure the system does not violate important moral prescriptions."⁵⁰⁵

The third principle is the one that is arguably stretched and broken by the increasing prison terms that have evolved over the past few decades,

496. See *infra* notes 499–43 and accompanying text.

497. See *infra* notes 499–43 and accompanying text.

498. See *infra* notes 499–589 and accompanying text.

499. See *supra* notes 114–16 and accompanying text.

500. See *supra* note 499 and accompanying text.

501. See *infra* notes 502–03 and accompanying text.

502. See *supra* text accompanying note 144.

503. See Burrow & Koons-Witt, *supra* note 73 at 275 (showing that only a few circumstances warrant departure from the current sentencing guidelines).

504. See *infra* notes 505–517 and accompanying text.

505. See generally *supra* Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 360.

especially in the United States.⁵⁰⁶ The need to punish criminals appropriately is grounded in sentencing via the proportionality principle, which is, simply stated, the requirement that the punishment should fit the crime.⁵⁰⁷ More fully, it is the principle that the seriousness of the harm caused by the crime should be matched by the hardship of the sanction.⁵⁰⁸ Proportionality is a cardinal sentencing consideration in Australia⁵⁰⁹ and a requirement of the sentencing regimes of ten states in the United States.⁵¹⁰ In addition, a survey of state sentencing laws by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to prohibiting excessive penalties or treatment,⁵¹¹ and twenty-two states have constitutional clauses that prohibit cruel and unusual penalties, including eight states with a proportionate penalty clause.⁵¹²

Broken down to its core features, proportionality has two limbs: the seriousness of the crime and the harshness of the sanction.⁵¹³ Further, the principle has a quantitative component—the two limbs must be matched.⁵¹⁴ For the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.⁵¹⁵ The criterion that should be used to measure offense severity and the hardship of a sanction is individual well-being.⁵¹⁶ The type and degree of punishment imposed on offenders should cause them to have their well-being set back to an amount equal to that

506. See *supra* notes 114–16 and accompanying text.

507. Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, *supra* note 493.

508. Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 784 (2008).

509. See BAGARIC & EDNEY, *supra* note 252.

510. See Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250–58 (2012) (focusing on the operation of the proportionality principle in Illinois, Oregon, Washington, and West Virginia).

511. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 155–56 (2010).

512. *Id.*

513. See *State v. Rodriguez*, 217 P.3d 659, 668–69 (Or. 2009) (“[A]pplication of the proportionality provision requires consideration of the relationship between the ‘gravity’ of the offense and the severity of the penalty.”).

514. *Id.*

515. *Id.*

516. Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, *supra* note 493.

which the crime set back the well-being of the victim.⁵¹⁷

There is no precise means of measuring offense severity.⁵¹⁸ Nevertheless, a number of tentative conclusions can be made.⁵¹⁹ First, property offenses—depriving victims of wealth, as opposed to diminishing their personal security—are overrated in terms of their seriousness.⁵²⁰ Wealth has a far smaller impact on personal happiness than a range of other factors, and thus, the criminal justice system should view these offenses less seriously.⁵²¹ By contrast, the available data suggests that victims of violent crime and sexual crime have their well-being more significantly set back than for other types of crime.⁵²² For example, one study showed that victims of violent crime, and sexual crime in particular, have difficulty being involved in intimate relationships,⁵²³ higher divorce rates,⁵²⁴ diminished parenting skills (although this finding was not universal),⁵²⁵ lower levels of success in the employment setting,⁵²⁶ and much higher levels of unemployment.⁵²⁷ Victims of property crimes, likewise, suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crimes.⁵²⁸

517. See *Rodriguez*, 217 P.3d at 668–69.

518. See generally Rochelle Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 10 J. TRAUMA & STRESS 189, 190–92 (2010) (analyzing the effects of crime victimization on the victim's quality of life, including ability to parent, intimate relationships, job productivity, social functioning, and overall life satisfaction).

519. *Id.* at 194.

520. *Id.* at 192 (finding that assessments comprised of mostly nonviolent property crime victims found the crime had very little negative impact on the victim's quality of life).

521. *Money Can't Buy Happiness*, AM. PSYCHOL. ASS'N (June 14, 2011), <http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx>.

522. See generally H. E. Barber, *Why Rape Is Bad*, in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 304, 304 (Alan Soble ed., 4th ed. 2002) (“To harm a person is to thwart, set back or otherwise interfere with his interests . . . Rape, like other crimes of violence, thwarts [these] interest[s] . . . [and] has a tendency to generate further harms—anxiety, feelings of degradation and other psychological states which may interfere with the victim's pursuit[s].”).

523. Hanson et al., *supra* note 518, at 191–92.

524. *Id.*

525. *Id.* at 191.

526. *Id.* at 192; see also M. DIXON ET AL., CRIMESHARE: THE UNEQUAL IMPACT OF CRIME 25 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1.

527. Hanson, *supra* note 518, at 192; see also M. DIXON ET AL., *supra* note 526, at 25.

528. See Adriaan J. M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in*

When it comes to measuring punishment severity, it is clear that imprisonment is the harshest commonly applied sanction.⁵²⁹ In fact, the pain of imprisonment has been considerably understated.⁵³⁰ There are also long term deprivations stemming from imprisonment, which transcend the period inmates spend behind bars.⁵³¹ The negative consequences of imprisonment include significantly reducing life expectancy;⁵³² vulnerabilities associated with financial matters; drug temptations; difficulty in decision-making and social interactions;⁵³³ difficulty experienced by former inmates in meeting their own basic needs, including experiencing hunger and homelessness and being unable to access health care;⁵³⁴ homelessness;⁵³⁵ negative impacts on family members of prisoners, including higher rates of divorce;⁵³⁶ higher rates of depression, anxiety and antisocial behavior among children of inmates;⁵³⁷ and difficulty in securing employment and lower rate of lifetime earnings.⁵³⁸

In terms of matching the severity of the punishment with the seriousness of the offense, it has been suggested that the type and degree of punishment imposed on offenders should cause them to have their well-being set back an amount equal to that which the crime set back the well-being of the

a Prospective and Longitudinal Study, 5 INT'L REV VICTIMOLOGY 141, 155–56 (1998).

529. See, e.g., NATIONAL RESEARCH COUNCIL, *supra* note 1, at 164–70.

530. *Id.*

531. See *infra* notes 532–38.

532. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 482 (2011). A study that examined the fifteen-and-a-half-year survival rate of 23,510 ex-prisoners in the state of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population. *Id.* There were 2650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected). *Id.* The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide. *Id.*; see also NATIONAL RESEARCH COUNCIL, *supra* note 1, at 220–26.

533. MICHAEL ROGUSKI & FLEUR CHAUVEL, *THE EFFECTS OF IMPRISONMENT ON INMATES' AND THEIR FAMILIES' HEALTH AND WELL-BEING* 61 (2009). A limitation of this research is that it had a small sample size consisting of only sixty-three participants. *Id.* at 3.

534. *Id.* at 61.

535. *Id.*

536. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 268.

537. *Id.* at 270.

538. *Id.* at 247. One study estimated the earnings reduction to be as high as 40%. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 12–13 (2010).

victim.⁵³⁹ This approach assesses both the hardship of punishment and the severity of crime, as they relate to well-being.⁵⁴⁰ This enables at least a crude match to be made, which stems from a number of premises.⁵⁴¹ First, the crimes that have the most serious adverse consequences for victims are violent and sexual offenses.⁵⁴² Secondly, the adverse effects of imprisonment seem to have been greatly undervalued.⁵⁴³ In light of this, a reasonable starting point is that, generally, imprisonment should be imposed only for sexual and violent offenses, and most prison terms should be reduced compared to those currently imposed.⁵⁴⁴ Of course, this says nothing about the appropriate length of imprisonment for certain categories of sexual and violent offenses.⁵⁴⁵ However, the default position should be that most prison terms for these offenses should be less than the current norm because current sentencing practices greatly underestimate the harshness of imprisonment.⁵⁴⁶

Proportionality, however, does not exhaust the range of orthodox or jurisprudentially desirable sentencing objectives.⁵⁴⁷ The three key sentencing aims that justify longer penalties are incapacitation, general deterrence, and specific deterrence.⁵⁴⁸ If these objectives are valid, they can potentially justify sanctions, which are harsher than the seriousness of the

539. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 34–35 (1991) (asserting that an interests analysis, similar to the living standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties); ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 112–13 (4th ed. 2005) (stating that proportionality at the outer limits “excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general”). This is in line with approaches of other theorists. *Id.*

540. Hirsch & Jareborg, *supra* note 539, at 3.

541. *See infra* notes 542–43.

542. *See* Hirsch & Jareborg, *supra* note 539, at 23–28.

543. *See* Bagaric & Gopalan, *supra* note 147.

544. *See id.* at 185.

545. Alan M. Dershowitz, *Preventative Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1282 (1973).

546. *See* Bagaric & Gopalan, *supra* note 147, at 238–39 (suggesting that most offenses should be dealt with in a manner that does not involve a term of imprisonment and that imprisonment should be mainly reserved for serious sexual and violent offenses).

547. *See id.* at 184–197.

548. *See id.*

offense.⁵⁴⁹ There has been a voluminous amount of empirical research into the efficacy of state-imposed punishment to achieve these goals of incapacitation, general deterrence, and specific deterrence.⁵⁵⁰ It is beyond the scope of this paper to consider these findings at length.⁵⁵¹ However, the trend of the findings is relatively consistent, and hence, it is possible to provide an overview of the relevant literature.⁵⁵²

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and thereby convincing them that crime does not pay.⁵⁵³ “It attempts to dissuade offenders from reoffending by inflicting an unpleasant experience . . . (normally imprisonment), which they will seek to avoid in the future.”⁵⁵⁴ The scientific data debunks specific deterrence as a plausible theory.⁵⁵⁵ The evidence does not establish that offenders who have been subjected to harsh punishment are less likely to reoffend than identically placed offenders who are subjected to lesser forms of punishment.⁵⁵⁶ Thus, there is no basis for pursuing the goal of specific deterrence.⁵⁵⁷ It follows that sentences should not be increased to attempt to achieve this goal.⁵⁵⁸

Similar considerations apply regarding general deterrence.⁵⁵⁹ There are

549. Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 375.

550. Mirko Bagaric et al., *Excessive Criminal Punishment Amounts to Punishing the Innocent: An Argument for Taking the Parsimony Principle Seriously*, 57 S. TEX. L. REV. 1, 7 (2015).

551. *See supra* notes 547–50 and accompanying text.

552. *See infra* notes 553–76 and accompanying text.

553. Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 123 (2009).

554. Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012); Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 375.

555. Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 375.

556. *Id.* In fact, some studies show the rate of recidivism among imprisoned offenders to be higher. *See* Nagin et al., *supra* note 553, at 135.

557. *See* Nagin et al., *supra* note 553, at 135.

558. *Id.* at 124.

559. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 90; NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 35 J. APPLIED ECON. 569, 576 (2001); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-*

in fact two forms of general deterrence.⁵⁶⁰ Marginal general deterrence is the theory that there is a connection between more severe penalties and lower crime—on the basis that potential offenders are dissuaded from committing crime by the prospect of a harsh sentence if they are apprehended.⁵⁶¹ This objective is unattainable.⁵⁶² In the most recent extensive analysis of the relevant literature, the U.S. National Academy of Sciences noted, “The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.”⁵⁶³ It follows that marginal deterrence should be disregarded as a sentencing objective.⁵⁶⁴

Deterrence does, however, work in a more limited sense.⁵⁶⁵ In the absence of the threat of *any* punishment for criminal conduct, crime would escalate.⁵⁶⁶ Thus, general deterrence works in the absolute sense: there is *a connection* between the existence of some form of criminal sanctions and criminal conduct.⁵⁶⁷ This is known as the theory of absolute general deterrence.⁵⁶⁸ In order to achieve this goal, the hardship must be something that people would seek to avoid, such as a fine or a short term of imprisonment.⁵⁶⁹ The important point is that there is no need to impose a particularly onerous penalty.⁵⁷⁰ Given this, it follows that no penalties

Analysis of Punishment, 15 EUR. J. CRIM. POL’Y RES. 201, 222–23 (2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 189–92 (2003); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–78 (2004); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 189–91 (2004).

560. See *infra*, notes 561–71 and accompanying text.

561. See Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn’t Work—And What It Means for Sentencing*, 35 CRIM L.J. 269 (2010).

562. See *supra* notes 560–61 and accompanying text.

563. NATIONAL RESEARCH COUNCIL, *supra* note 1, at 5.

564. See *supra* notes 559–63 and accompanying text.

565. See *infra* notes 566–67 and accompanying text.

566. See Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 381–82.

567. See *id.*

568. Bagaric & Alexander, *supra* note 561.

569. *Id.*

570. *Id.*

should be escalated on the basis of this objective.⁵⁷¹

Incapacitating offenders in prison is the most effective form of community protection, given that offenders cannot commit crime in the community during their period of confinement.⁵⁷² However, incapacitation is only necessary if the offender would have reoffended if he or she was not incarcerated.⁵⁷³ Incapacitation in its broadest sense (as being applicable to all offenders and all offense types) is flawed, because we are poor at predicting which offenders are likely to commit offenses in the future (especially in relation to serious offenses),⁵⁷⁴ and while incapacitation seems to work in the case of certain categories of minor offenses, the cost of imprisoning minor offenders normally outweighs the seriousness of the offense.⁵⁷⁵ To the extent that incapacitation is justifiable, it should be confined to recidivist serious sexual and violent offenders, where a recidivist loading of 20% to 50% should be applied because it is consistent with their rate of reoffending.⁵⁷⁶

It follows that offenders should be punished commensurate with the seriousness of their crime and that the level of punishment should not be increased to satisfy common sentencing objectives in the form of general deterrence, specific deterrence, and incapacitation (except to a relatively

571. See *supra* notes 565–70 and accompanying text.

572. See Bagaric, *From Arbitrariness to Coherency in Sentencing*, *supra* note 142, at 384.

573. See *id.* at 383.

574. See Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, J. APPLIED SECURITY RES. 317, 322–23 (2011). For the most thorough treatment of the subject matter, see DANGEROUS PEOPLE: POLICY, PREDICTION AND PRACTICE (Bernadette McSherry & Patrick Keyzer eds., 2011). See also BERNADETTE MCSHERRY & PATRICK KEYZER, SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE (2009).

575. William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, CRIME & JUST. 419, 420, 485 (2000); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F.L. REV. 585, 594 (2009); NATIONAL RESEARCH COUNCIL, *supra* note 1, at 4; *Prison and Crime: A Complex Link*, PEW CHARITABLE TRS. (Sept. 11, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime>; Don Weatherburn et al., *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, 2 INT'L J. PUNISHMENT & SENT'G 8, 8–9, 25–26 (2006); Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 187, 209 (Alfred Blumstein, Jacqueline Cohen, & Daniel Nagin eds., 1978); see generally ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA* (2000).

576. Bagaric, *supra* note 33, at 416.

minor extent regarding recidivist serious sexual and violent offenders).⁵⁷⁷ We have previously suggested that a principled approach to sentencing requires considerably more lenient punishments, especially for property and drug offenses.⁵⁷⁸ By way of example, the appropriate penalties suggested are set out in the following chart.⁵⁷⁹

Offense	Penalty Level
Theft	Fine ⁵⁸⁰
Theft of more than \$10,000	0–6 months imprisonment ⁵⁸¹
Insider trading	0–6 months imprisonment ⁵⁸²
Trafficking small quantities of drugs (e.g., less than 50 grams cocaine)	0–6 months imprisonment ⁵⁸³
Burglary of a residence	0–6 months imprisonment ⁵⁸⁴
Robbery (without the use of a weapon)	1 year imprisonment ⁵⁸⁵
Robbery with a weapon	2 years imprisonment ⁵⁸⁶
Aggravated assault	5 years imprisonment ⁵⁸⁷

577. See Gopalan & Bagaric, *supra* note 147, at 87.

578. See *supra* Part V.

579. See *infra* notes 580–91 and accompanying text.

580. Cf. U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(a)(2), 5A (U.S. SENTENCING COMM’N 2016) (contrasting this as a level six offense, which carries a penalty range of zero to eighteen months imprisonment).

581. Cf. *id.* at §§ 2B1.1(b)(1), 5A (finding a theft of more than \$15,000 as a level ten offense, which carries a penalty range of six to thirty months imprisonment).

582. Cf. *id.* at §§ 2B1.4, 5A (contrasting this as a level eight to fourteen offense, which carries a penalty range of zero to forty-six months imprisonment).

583. Cf. *id.* at §§ 2D1.1(c)(14), 5A (contrasting this as a level twelve offense, which carries a penalty range of ten to thirty-seven months imprisonment).

584. Cf. *id.* at §§ 2B2.1(a)(1), 5A (contrasting this as a level seventeen offense, which carries a penalty range of twenty-four to sixty-three months imprisonment).

585. Cf. *id.* at §§ 2B3.1(a), 5A (contrasting this as a level twenty offense, which carries a penalty range of thirty-three to eighty-seven months imprisonment).

586. Cf. *id.* at §§ 2B3.1(b)(2), 5A (contrasting this as a level twenty-three to twenty-seven offense, which carries a penalty range of 46 to 162 months imprisonment).

587. Cf. *id.* at §§ 2A2.2(a)–(b), 5A (contrasting this as a level fourteen to twenty-four offense, which carries a penalty range of 15 to 125 months imprisonment).

Trafficking large quantities of drugs (e.g., more than 450kg of cocaine)	5 years imprisonment ⁵⁸⁸
Kidnapping with ransom demand	7 years imprisonment ⁵⁸⁹
Criminal sexual abuse (i.e., rape)	10 years imprisonment ⁵⁹⁰
First degree murder	20 years imprisonment ⁵⁹¹

Implementation of these reforms would considerably limit the number of offenders who become elderly while in prison.⁵⁹²

The next issue is how to approach the sentencing of offenders who are fifty years or older at the time of sentence.⁵⁹³ The first answer lies in reforming the system as a whole in light of the above principles.⁵⁹⁴

B. Reforms for Sentencing Offenders Who Are Aged at the Time of Sentencing

Even in light of the current status quo, there are two specific principles that should apply regarding aged offenders.⁵⁹⁵ These are also appropriate in the context of the proposed reforms above.⁵⁹⁶ Two mitigating factors should be applied to old offenders, which relate to their prospect of rehabilitation.⁵⁹⁷

588. *Cf. id.* at §§ 2D1.1(c)(1), 5A (contrasting this as a level thirty-eight offense, which carries a penalty range of 235 months imprisonment to life imprisonment).

589. *Cf. id.* at §§ 2A4.1(b)(1), 5A (contrasting this as a level thirty-eight offense, which carries a penalty range of 235 months imprisonment to life imprisonment).

590. *Cf. id.* at §§ 2A3.1(a), 5A (contrasting this as a level thirty to thirty-eight offense, which carries a penalty range of ninety-seven months imprisonment to life imprisonment).

591. *Cf. id.* at §§ 2A1.1(a), 5A (contrasting this as a level forty-three offense, which carries a penalty of life imprisonment).

592. *See supra* notes 580–91 and accompanying text.

593. *See infra* Part VII.B (describing the needed reforms for sentencing offenders who are aged at the time of sentencing).

594. *See supra* Part V (listing three reasons why the sentencing for the aged should be administered in a manner that is less harsh).

595. *See supra* Sections V.A and V.B.

596. *Compare supra* Table accompanying notes 579–91 (suggesting the appropriate penalties for each offense listed in the table), *with supra* Sections V.A and V.B (finding that aged offenders' levels of recidivism are lower than non-aged offenders, and aged offenders experience an extra burden in prison).

597. *See supra* Sections V.A and V.B (arguing that because aged offenders reoffend at far lower rates than non-aged offenders and aged offenders face more suffering in prison, those two aspects should be mitigating factors in the sentencing of the aged).

Aged offenders reoffend at far lower rates than other offenders.⁵⁹⁸ Prison has two main functions: to punish offenders and protect the community.⁵⁹⁹ The second of these considerations is not as important in the case of aged offenders, given that they reoffend at far lower rates than other offenders.⁶⁰⁰

The second mitigating factor that should apply to aged offenders stems from the extra burden they experience in prison.⁶⁰¹ To this end, in evaluating the nature and extent of punishment, it is necessary to factor in the actual impact of the hardship on the offender.⁶⁰² In relation to imprisonment, the most obvious and deliberate form of deprivation is the loss of liberty; however, there are also a number of other hardships that often arise as a result of incarceration.⁶⁰³ If a sanction typically imposes an unintended but real additional concrete burden on a certain category of offenders (directly or indirectly), this too should be incorporated into sentencing calibrations.⁶⁰⁴ The view that punishment includes incidental suffering admittedly evinces a liberal approach to the nature of punishment, given that there is no requirement for a court to intentionally impose the hardship.⁶⁰⁵ However, in principle, there is no reason that incidental hardships, especially those that are common and foreseeable, should not be considered as punishment.⁶⁰⁶ Certainly, courts in Australia have accepted

598. See *supra* Section V.A (describing multiple studies comparing the actions of aged offenders with the actions of younger offenders and showing that older offenders have outgrown the years in which they are most likely to engage in crime).

599. See *supra* note 144 and accompanying text (finding that prison punishments provide community protection, general deterrence, specific deterrence, rehabilitation, and retribution).

600. See *supra* note 304 and accompanying text.

601. See *supra* Section V.C.

602. See *supra* notes 539–40 and accompanying text.

603. See *supra* notes 532–38 and accompanying text.

604. See *supra* text accompanying notes 569–71, 577.

605. See Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, (2003) (noting that it is the “[m]ore primitive societies [that] impose the universal privations of pain and humiliation upon criminals” and taking issue with the notion “that suffering could have any ‘intrinsic value’ whatsoever”).

606. But see Robinson et al., *supra* note 229, at 21–22 (noting that “different decisionmakers commonly can come to widely different views on whether to adjust punishment for an [extralegal punishment factor]” and that “[s]uch fundamental disagreements invite a common practice in which the offender’s punishment will depend less on the offense committed and his blameworthiness for it, or on any rational crime-control policy, but rather upon the good or bad luck of the defendant in the decisionmaker he draws”).

that incidental suffering sustained by the offender can be used as a basis for offsetting or reducing the need for formal punishment.⁶⁰⁷ Thus, injuries sustained by an offender during the commission of an offense,⁶⁰⁸ such as public humiliation⁶⁰⁹ and reduced employment prospects,⁶¹⁰ are mitigatory and often taken into account to ascertain the punishment experienced by an offender.⁶¹¹ Further, it is recognized that particularly harsh prison conditions can mitigate penalty.⁶¹² These incidental or additional hardships are regarded as offsetting the need for a fully proportionate penalty because they are a component of the net punishment experienced by the offender.⁶¹³ As noted by Kolber:

For a purported justification of punishment to be successful, it must take account of offenders' negative subjective experiences or else be vulnerable to the charge that it fails to justify the full magnitude of the punishments we impose. While some theorists purport to hold objective accounts of punishment that ignore offenders' subjective experiences, such theories are doomed to fail. By ignoring subjective experience, they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.⁶¹⁴

This approach should be taken with the additional burdens that the aged

607. Cf. *Hardship to the Offender*, NAT'L JUDI. COLL. AUSTL. (Oct. 27, 2016), https://njca.com.au/sentencing/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/hardship/ (noting that while "[t]here is no explicit recognition of hardship to the offender as a relevant sentencing factor in s 16A(2) of the Crimes Act 1914 (Cth), . . . [t]here are some listed sentencing factors in [this section] which may arise for consideration when hardship to an offender is raised, . . . [such as] the character, antecedents, age, means and physical or mental condition of the offender").

608. *R v Hannigan* (2009) 193 A Crim R 399, 401–02 (Austl.) (reviewing whether police abuse during arrest should be taken into account for purposes of sentencing).

609. *Ryan v The Queen* (2001) 206 CLR 267, 269 (Austl.).

610. *Kovacevic v Mills* (2000) 76 SASR 404, 420 (Austl.).

611. See generally Mirko Bagaric et al., *The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders*, 39 UNIV. NEW S. WALES L.J. 47 (2016).

612. Mirko Bagaric & Theo Alexander, *(Particularly) Burdensome Prison Time Should Reduce Imprisonment Length—and Not Merely in Theory*, 38 MELB. U. L. REV. 409, 415–16 (2014).

613. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 183–84 (2009).

614. *Id.* at 184.

often endure in a prison setting.⁶¹⁵ The main criterion regarding penalty severity is the extent to which the penalty sets back the interests and flourishing of offenders.⁶¹⁶ Prison is damaging because human beings have an innate desire for freedom and the capacity to shape their activities and lives according to their preferences.⁶¹⁷ However, certain people find this experience more burdensome than others.⁶¹⁸ Aged offenders are one example.⁶¹⁹

Precise weightings should apply to a range of aggravating and mitigating considerations.⁶²⁰ Consistent with this analysis, aged offenders should receive a 20% penalty reduction because of their reduced risk of reoffending.⁶²¹ They would also receive a 50% reduction because of the extra burden of imprisonment.⁶²² For reasons set out above, these considerations should apply to all aged offenders.⁶²³

When there is one applicable mitigating factor, these considerations should “not operate in a simple cumulative manner; otherwise, a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts or additions are to be applied individually to the contracted sentence following application of the previous consideration.”⁶²⁴ Applying the above two discounts means that all aged

615. See *supra* Section V.C.

616. Cf. Bradley, *supra* note 605, at 21 (noting that “societies typically deprive criminals of human resources—time, limb, life, or money—which have no relation to the particular criminal harm”).

617. See generally Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More than Random Thoughts*, 29 HARV. J.L. & PUB. POL’Y 33, 33–35 (2005).

618. Kolber, *supra* note 613, at 183 (stating that even when sentences “are identical in name,” “punishment experiences [can be] quite different in severity”).

619. Cf. *id.* at 193–94 (noting that “although the suffering an offender experiences in prison likely varies with age, ‘[a]ge (including youth) is not ordinarily relevant in determining whether a departure is warranted’”) (footnote omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.1).

620. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1234, 1236 (2014) [hereinafter Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*].

621. *Id.* at 1234–36.

622. *Id.*

623. See *supra* Part V.

624. Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing*, *supra* note 620, at 1235.

offenders should receive a 60% sentencing discount.⁶²⁵

Removing very elderly prisoners from prison is an additional reform that should be adopted.⁶²⁶ There are other ways to limit the liberty of offenders, beyond confining them behind high walls.⁶²⁷ When inmates turn sixty-five years old in prison, the physical walls that confine them should be replaced by electronic barriers erected by electronic monitoring.⁶²⁸ As we have seen, the incarceration costs of offenders grow as they become older.⁶²⁹ The caveat to this is that prior to being released on electronic monitoring at age sixty-five, the inmates must have completed half of their sentence—to ensure the principle of proportionality is not violated—and not be an ongoing danger to the community.⁶³⁰ The advantage of electronic monitoring is that it can confine offenders at a fraction of the cost of imprisonment.⁶³¹

Electronic monitoring, which originated in the United States in the early 1980s, is used in a number of countries, including the United Kingdom.⁶³² Reports indicate that over 100,000 people are under electronic monitoring in the United States.⁶³³ The main advantage of electronic monitoring is that the

625. See *id.* Once the entire sentence is contracted by initial 20% discount, the next 50% discount operates on the remaining 80% of the sentence resulting in another net discount of 40%—reflecting a 60% discount on the total sentence.

626. See generally, Jamie Fellner, *Frail and Elderly Prisoners: Do They Still Belong Behind Bars?*, HUMAN RIGHTS WATCH (May 29, 2012), <https://www.hrw.org/news/2012/05/29/frail-and-elderly-prisoners-do-they-still-belong-behind-bars>.

627. Mike Nellis, *Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews*, 1 EUR. J. PROB. 41, 41–44 (2009) (using electronics to monitor people and enforce curfews and “partial confinement” rather than walls and guards).

628. *Id.* at 57 (finding that electronic monitoring curfews utilize a “precise (non-ocular) nature of the surveillance technology involved” and have “regulatory effects above and beyond mere confinement”).

629. See *supra* Section V.B.

630. See *supra* text accompanying notes 506–17.

631. NAT’L AUDIT OFFICE, THE ELECTRONIC MONITORING OF ADULT OFFENDERS 13 (2006), <https://www.nao.org.uk/wp-content/uploads/2006/02/0506800.pdf>; see also Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125, 144 (2011).

632. See Nellis, *supra* note 627, at 41.

633. Mike Nellis, *Electronic Monitoring: Exploring the Commercial Dimension*, 58 CRIM. JUST. MATTERS 12, 12 (2008); MATTHEW DEMICHELE & BRIAN PAYNE, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE 10 (2d ed. 2009); Lars H. Andersen & Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL’Y 349, 351–52 (2014) (including a summary of electronic monitoring’s

device itself costs far less than the cost of building a prison cell, and the ongoing monitoring costs are lower than the operating costs of prison.⁶³⁴ In addition, electronic monitoring results in far lower rates of reoffending.⁶³⁵

Studies indicate that active electronic monitoring is correlated with lower recidivism.⁶³⁶ For example, a study of recidivism rates of Argentinian offenders, comparing those who had been jailed versus those who had been tagged, showed that the former's recidivism rate was 22% compared to 13% for the latter.⁶³⁷

Despite this, there has been a decline in the use of electronic monitoring.⁶³⁸ As noted by Lars H. Andersen and Signe H. Andersen, there are three main reasons for this:

First, the money saved on imprisonment thanks to the use of electronic monitoring was now spent on testing and supervising the electronically monitored people (e.g., alcohol tests). Second, electronic monitoring and other noncustodial alternatives to imprisonment tended to widen the punitive system by putting more

introduction and use in the United States); see also Brian K. Payne, *It's a Small World, but I Wouldn't Want to Paint It: Learning from Denmark's Experience with Electronic Monitoring*, 13 CRIMINOLOGY & PUB. POL'Y 381, 381–82 (2014) (providing additional insight into the evolution of electronic monitoring and future monitoring research); Matthew DeMichele, *Electronic Monitoring: It Is a Tool, Not a Silver Bullet*, 13 CRIMINOLOGY & PUB. POL'Y 393, 393 (2014).

634. See NAT'L AUDIT OFFICE, *supra* note 631, at 2 (finding the cost of electronic monitoring is about one-fifth that of imprisonment and considered "robust" in detecting violations of the term of the order).

635. NAT'L AUDIT OFFICE, *supra* note 631, at 3.

636. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf>; Fredrik Marklund & Stina Holmberg, *Effects of Early Release from Prison Using Electronic Tagging in Sweden*, 5 J. EXPERIMENTAL CRIMINOLOGY 41, 53 (2009).

637. Rafael Di Tella & Ernesto Schargrodsky, *Criminal Recidivism After Prison and Electronic Monitoring*, 121 J. POL. ECON. 1, 18 (2013); see also WILLIAM BALES, ET AL., NAT'L INST. OF JUST., U.S. DEP'T JUST., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING 2 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf>; STEPHEN V. GIES, ET AL., NAT'L INST. OF JUST., U.S. DEP'T OF JUST., MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT xvii, 1–11 to 1–12 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf>; JOHN K. ROMAN, ET AL., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C., D.C. CRIME POL'Y INST. 10 (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF>.

638. Andersen & Andersen, *supra* note 633, at 351.

people under the purview of the criminal justice system. Third, the more intensive testing and supervision increased detection rates for recidivism and technical violations, which in turn sent even more people into custody. This led some policy makers to view electronic monitoring and other noncustodial alternatives to imprisonment as failed social experiments, and the popularity of these programs faded in the United States.⁶³⁹

None of these potential issues apply to aged offenders.⁶⁴⁰ This proposed reform only applies to offenders already in prison; therefore, there is no prospect of making more offenders subject to the purview of the criminal justice system.⁶⁴¹ Electronic monitoring does not provide the same degree of assuredness that the offender will not reoffend as imprisonment.⁶⁴² However, the infirmity of older offenders provides another layer of security.⁶⁴³

VIII. CONCLUSION

The number of aged prisoners in the United States and Australia is growing rapidly.⁶⁴⁴ Elderly people who commit crime should be punished appropriately for their actions, but this does not mean that they should receive the same penalties as other offenders.⁶⁴⁵ There are a number of mitigating factors that apply more commonly to older offenders, which should result in them receiving lower penalties.⁶⁴⁶ First, they present a lower level of risk to the community; the rate of recidivism of aged prisoners is far less than for other offenders.⁶⁴⁷ Second, their infirmity makes them less physically capable of committing many types of crimes.⁶⁴⁸ Third, aged

639. *Id.*

640. *See infra* notes 641–43 and accompanying text.

641. *See supra* text accompanying note 626.

642. Andersen & Andersen, *supra* note 633, at 351; *see supra* Part IV.

643. *See* HUMAN RIGHTS WATCH, *supra* note 11 (concluding that prisoners “no longer pose a public safety risk because of age and infirmity”).

644. *See supra* Part III.

645. *See supra* Part V.

646. *See supra* Part V.

647. *See supra* Section V.A.

648. *See supra* Section V.A.

offenders find prison far more burdensome.⁶⁴⁹ Fourth, their incarceration takes a greater toll on community resources than other offenders.⁶⁵⁰ Elderly offenders also have far greater medical needs than other prisoners, and these needs are more expensive when in the prison setting.⁶⁵¹

To deal effectively with the problem of the rising number of aged inmates, it is important to understand that there are two groups of persons underpinning the problem.⁶⁵² The first is the high number of offenders who age in prison because of lengthy prison terms they receive at a younger age.⁶⁵³ This problem can only be addressed by a wide-ranging review of the criminal justice system.⁶⁵⁴ A principle and empirically driven assessment suggests that there should be a considerable reduction of average penalty levels for most types of offenses and, in particular, nonviolent and nonsexual offenses.⁶⁵⁵ This would considerably lower the number of prisoners who grow old in prison.⁶⁵⁶

The second cohort of offenders is those who are sentenced after turning fifty years of age.⁶⁵⁷ They should receive lower penalties based on their better prospects of rehabilitation and the additional burden they suffer in prison.⁶⁵⁸ The penalty discount would be in the order of 60%.⁶⁵⁹

Finally, all offenders who turn sixty-five years of age (and who have served at least half of their sentence and are not a significant danger to the community) should be removed from prison and placed on electronic monitoring.⁶⁶⁰ This would greatly reduce the cost related to their confinement, while not meaningfully compromising community safety.

These changes would limit the gratuitous suffering that is inflicted on many offenders and recognize the relevantly different situation of aged

649. *See supra* Section V.C.

650. *See supra* Section V.B.

651. *See supra* Section V.B.

652. *See infra* text accompanying notes 653, 657.

653. *See supra* text accompanying notes 116–22.

654. *See supra* Part III.

655. *See supra* Part IV.

656. *See supra* Section VII.A.

657. *See supra* notes 123–24 and accompanying text.

658. *See supra* Section VII.B.

659. *See supra* Section VII.B.

660. *See supra* Section VII.B.1.

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offenders, while at the same time, saving billions of dollars to the community without compromising community safety.
